No. 10014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendant and Appellee.

APPELLANTS' OPENING BRIEF.

ELLIS I. HIRSCHFELD,
1215 Bankers Building, Los Angeles,

SAMUEL W. BLUM,
1134 Board of Trade Building, Los Angeles,

Attorneys for Appellants.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

PAGE

PAGE

STATUTES.

PAGE

TEXTBOOKS.

INDEX TO APPENDIX.

No. 10014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendant and Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

This action was commenced in the Superior Court of the State of California in and for the County of Los Angeles. Plaintiffs (Appellants) therein sought recovery of $35,256.99, plus interest and costs, upon a final German judgment, from Universal Pictures Corporation, a New York corporation, and Universal Pictures Company, Inc., a Delaware corporation (Appellee). [R. pp. 2-9.] The cause, upon application of Appellee, was removed to the United States District Court by order of said Superior Court. The removal petition alleged that Plaintiffs were citizens of California; that Appellee was a Delaware corporation and a citizen of said State; that Defendant, Universal Pictures

Corporation, was a dissolved New York corporation, and that the amount in controversy, exclusive of interest and costs, exceeded $3,000.00, to-wit: $35,256.99. [R. pp. 9a-16.] Therefore, said District Court acquired jurisdiction herein under Title 28, Section 71, U. S. C. A. (Jud. Code Sec. 28 amended), Title 28, Section 41, Subsection 1 (Jud. Code, Sec. 24 as amended).

Briefly, the amended complaint* [R. pp. 2-9] alleged that plaintiffs were citizens of California; that Defendant Universal Pictures Corporation was a New York corporation, and that Universal Pictures Company, Inc. was a Delaware corporation [R. p. 2]; that the Superior Court in Berlin, Germany (Landgericht), and the District Court of Appeal in Berlin, Germany (Kammergericht), were courts of record and of general jurisdiction, and that the Supreme Court of Germany (Reichsgericht) was a court of record having appellate jurisdiction, and that all three courts were duly created by the laws of the German Republic. [R. p. 3.]

That on July 27, 1932, Mayfilm Corporation, a German corporation, upon appeal from the Landgericht, recovered a judgment of 50,000 Reichmarks, plus interest and costs, against Universal Pictures Corporation, the New York Corporation, in the Kammergericht, and that this judgment was affirmed by the Reichsgericht and became final [R. pp. 3-5]; that the amount of said judgment transmuted into lawful money of the United States up to January 1, 1937, was $35,256.99. [R. p. 9.]

---

*The original complaint, before service thereof, was superseded by an amended complaint, filed as of course while the action was still pending in the State Court.

That a dispute arose between Joe May and the Liquidator of the Mayfilm Corporation over the ownership of said judgment, and in an action between the Bank for Foreign Commerce (assignee of Joe May) and Mayfilm Corporation in liquidation, the Landgericht adjudicated that Joe May and not Mayfilm Corporation was the owner of said judgment, and that the assignment thereof by Joe May to the aforesaid Bank was valid. [R. pp. 5-6.]

That the judgment had previously been assigned to said Bank to secure a loan made by Mayfilm Corporation and guaranteed by Joe May and one Fritz Mandl. That Mandl, as guarantor, paid the debt, and by German law became the owner of the security, *i. e.*, judgment. That notice thereof had been given to the defendant by said Bank. [R. p. 7.]

That Mandl assigned the judgment to the Union Bank & Trust Company of Los Angeles which assigned it to Plaintiffs, and the judgment remains unpaid. [R. p. 8.]

That prior to this action Universal Pictures Corporation was dissolved and its obligations, including the one sued upon, was assumed by Universal Pictures Company, Inc. [R. p. 9.] Plaintiff prayed for judgment of $35,256.99 plus interest and costs. [R. p. 9.]

Appellee, by amended answer* [R. pp. 17-27] admitted the existence and jurisdiction of the German Courts, but denied that said Courts acquired jurisdiction of Universal Pictures Corporation. It denied, upon lack of information and belief, the other allegations of the complaint, except that it admitted the dissolution of Universal Pictures Corporation and the assumption of its obligations by appel-

---

*A demurrer to the original answer was sustained in part and was superseded by the amended answer.

lee. Appellee alleged as a further defense that the judgment sued upon had been attached as the property of Mayfilm Corporation by a third person in another action in Germany, and that by reason thereof defendant was prevented from paying said judgment to plaintiffs. Appellee's third defense asserting that as a matter of comity, the Court should not enforce or recognize the German judgment but should inquire into the same upon the merits, was attacked by demurrer which was sustained. [R. p. 29.]

This cause was tried by the District Judge, sitting without a jury, who in a written opinion rendered his decision for Appellee upon the theory that Appellants had not established their ownership to the German judgment. [R. pp. 30-33.] On November 22, 1940, written Findings of Fact and Conclusions of Law and Judgment for Appellee were signed and filed [R. pp. 34-42], and notice thereafter was given to the parties. On December 2, 1940, Appellants served and filed a motion for new trial [R. pp. 42-61], and thereafter the same was duly and seasonably heard [R. pp. 83-89], and on March 3, 1941, the said motion was denied. [R. p. 90.] On May 29, 1941, notice of appeal was filed by Appellants and the appeal herein was perfected. [R. pp. 90-91.]

The United States Circuit Court of Appeals acquired jurisdiction herein by virtue of an appeal having been taken to this Court by Appellants from the judgment of the District Court within three months after the denial of Appellants' motion for new trial, under Title 28, Sec. 225, Subd. (a) First, U. S. C. A. (Jud. Code Sec. 128, amended) and under Title 28, Sec. 230 U. S. C. A., and pursuant to Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

(A) Statement of the Facts.

Appellants brought an action to enforce a German judgment. At the trial there was no dispute as to its validity, and it was admitted that the judgment was unpaid. The defense that the German courts had not obtained jurisdiction of the judgment debtor, Universal Pictures Corporation was abandoned. [R. p. 104.] The defense of prevention of payment by virtue of a third party attachment was rejected during the trial by the trial court on the ground that the evidence then disclosed that nothing had been sequestered and it would be pointless to take further evidence on that issue. [R. p. 534.] A third defense of comity was not urged, as a demurrer thereto had been sustained thereto before the trial commenced. [R. p. 409.] The primary issue was the ownership of the judgment itself.

In 1926, Mayfilm Corp., a German corporation, brought an action for breach of contract, against the Universal Pictures Corp., a New York corporation, in the "Landgericht," a court in Berlin, comparable to a county Superior Court. March 30, 1930, judgment therein was rendered in favor of the defendant. [Pl. Ex. 2, R. pp. 106-114.] An appeal was taken to the District Court of Appeal, at Berlin, *i. e.,* the "Kammergericht," where on July 27, 1932, the Landgericht judgment was reversed, and an award of 50,000 Reichsmarks, plus interest, was made in favor of the Mayfilm Corp. [Pl. Ex. 2, R. pp. 117-170.] Both sides appealed to the Supreme Court, *i. e.,* "Reichsgericht," and on February 3, 1933, the Kammergericht judgment was affirmed. [Pl. Ex. 2, R. pp. 171-197.]

Subsequent events as hereinafter related, gave rise to further litigation. In 1934, the Bank for Foreign Commerce, a German Bank, hereafter referred to as "Bank," claimed to be the owner of the above judgment against Universal. This claim was disputed by the Mayfilm Corporation, by its Liquidator. May 30, 1934, the Bank commenced action against the Mayfilm Corporation, for declaratory relief, in the Landgericht of Berlin, to determine ownership of that judgment. In this declaratory relief action, the judgment roll shows that: (a) August 29, 1930, one Joe May purchased certain assets of the Mayfilm Corp., which assets included among other things, the then defeated cause of action against Universal. (b) That on May 30, 1932, while such original action against Universal was being appealed, but prior to the later Kammergericht judgment against Universal, Joe May assigned said claim to the Bank [Pl. Ex. 4, R. 210-212], and (c) on February 9, 1934, after Kammergericht had rendered its judgment against Universal, May further assigned said Kammergericht judgment to said Bank. [Pl. Ex. 5, R. pp. 245, 246; 482.] (d) That Joe May had since August 29, 1930, carried on the litigation of the claim against Universal in the corporate name of Mayfilm Corp. "as a matter of form," personally advanced all costs, "gave information," through the Kammergericht and the Reichsgericht [Pl. Ex. 4, R. pp. 229, 230]; (e) That Joe May deposited a copy of the assignment of May 30, 1932, with the clerk of the Court. [Pl. Ex. 4, R. pp. 210-212.]

This action for declaratory relief resulted in a final decree on February 11, 1935, by the Landgericht, in favor of the Bank, adjudicating that the judgment against Uni-

versal was the property of Joe May personally, was not the property of Mayfilm Corp. and that the assignment thereof by May to the Bank was valid. [Pl. Ex. 4, R. pp. 226, 227.]

Said Declaratory Judgment of the Landgericht will hereinafter be referred to as "Decree" and the original judgment against Universal sued upon will herinafter be referred to as "judgment."

Further, regarding the assignment of the 50,000 Reichsmarks judgment by May to the Bank, in the trial of the action at bar, it was shown that said assignment was "by way of security" for an obligation due to the Bank, and that in addition thereto said Joe May and one Fritz Mandl became personal guarantors of the obligation. [R. pp. 264, 280.]

Subsequently Fritz Mandl was required to, and did pay the aforesaid obligation to the Bank [R. pp. 263, 280], and thereby became entitled to said security, to-wit: the judgment. Mandl's "right" to receive said security was not questioned by appellees. Appellants introduced evidence, oral and documentary of a *written assignment* of the judgment by the Bank to Mandl [R. pp. 264, 270, Pl. Ex. 11; R. pp. 295-7, Pl. Ex. 5; R. pp. 246-7], as well as facts disclosing an assignment by operation of law.

Further, under date of February 12, 1936, said Bank, in writing, notified the Judgment Debtor, Universal Pictures Corp. that Mandl had paid the principal obligation, that the judgment against Universal "has been transferred to . . . Mandl" and that Universal can satisfy this debt only by payment to Mandl. [Pl. Ex. 11, R. pp. 295, 297;

Pl. Ex. 5, R. pp. 246, 247.] On April 29, 1936, Mandl assigned said judgment to the Union Bank and Trust Co. of Los Angeles [Pl. Ex. 6, R. pp. 254, 256], and on January 16, 1937, said Union Bank assigned the judgment to appellants. [Pl. Ex. 8, R. pp. 258, 259.] Appellees do not question the last two assignments.

There was agreement between the parties at the trial, that the value of German Marks in American Dollars, and the computation of interest from 1926 on the judgment (2% over Reichsbank Discount Rates) could be ascertained from a local bank expert in foreign exchange. Accordingly the principal was computed at $11,862.50, and the interest to date of trial, September 24, 1940, was determined to be $12,472.26. [R. pp. 301-5, Pl. Ex. 2; R. pp. 120, 303, 549.]

Appellees admitted that Universal Pictures Corporation, the original judgment debtor had been dissolved, and the present appellee, Universal Pictures Company, Inc., had assumed and agreed to pay the former's obligations subject to all proper defenses or set-offs. [R. p. 20.] Because of this admission, both companies will be hereinafter referred to by the singular word "Universal."

Appellees attacked Appellants' title by advancing the following theories: 1. That the declaratory decree should be ignored because (a) that said decree, though final, was erroneous (appellants' procedure in this respect was to elicit answers from experts to hypothetical questions concerning German law. Appellants made timely objections.) (b) That said decree, even if not erroneous, did not affect the judgment debtor (Universal) because the latter was

not a party to that action, and therefore said decree was of no evidentiary value herein; (c) that the said decree was in conflict with a portion of the "grounds for decision" in the original Kammergericht Judgment. 2. Appellees, though conceding that Mandl had a "right" to receive the judgment against Universal from the Bank, when he had paid them, contended that neither the transactions had, nor the notice given by the Bank to Universal, nor the operation of German law, nor the evidence introduced of an assignment were sufficient, either individually or collectively, to consummate the formal assignment which appellees insisted was necessary under German law.

(B) Questions Involved.

1. Is the judgment herein contrary to law?

This involves a consideration of whether the trial court correctly applied the proper law to the facts.

2. Is the judgment herein contrary to the evidence?

This involves a consideration of all the evidence in the printed record.

3. Is the judgment supported by the evidence?

This involves a consideration of all the evidence in the printed record.

4. Are the findings of fact supported by the evidence?

This involves a consideration of all the evidence in the printed record.

5. Did the Court err in determining that the Appellants failed to establish their ownership of the judgment sued upon?

This involves a consideration of the evidence and whether the correct law was properly applied.

6. Did the Court err in permitting, over Appellants' objections, the introduction of oral expert opinion evidence tending to collaterally impeach the final German declaratory decree, upon the theory (Appellees') that such decree was *erroneous* under German law?

This involves a consideration of the ruling upon the objection made to the testimony given by appellees' witnesses.

7. In determining the issue of Appellants' ownership of the judgment, did the Court err in holding that the final German decree was of "no evidentiary value" whatsoever because the Judgment Debtor was not a party thereto, where said decree adjudicated the ownership of the said judgment between the only claimants thereto and Appellants derived their title from and through the successful claimant?

This involves a consideration of the findings, the evidence and the law.

8. Did the trial court err in holding that that portion of the Kammergericht judgments designated therein as "Grounds for Decision" was *res adjudicata* on the issue of ownership of said judgment as between the *parties hereto* and that therefore the subsequent declaratory decree should be disregarded?

This involves a consideration of the findings, the evidence and the law.

9. Where appellants' pleadings alleged an assignment by operation of German Law, and the evidence introduced included proof of an additional actual assignment and thereby created, without objection, the further issue of such actual assignment, did the Court err in ruling that it

would limit appellants to proof of an assignment by operation of German Law alone, and any other form of assignment would not be considered because of said pleadings?

This involves a consideration of pleadings, the evidence, the law and the Court's ruling thereon.

10. Are certain designated "findings of fact" in the Judgment Roll sufficient, either in form or content, to legally constitute findings of material ultimate facts, or are they naked unsupported conclusions of law?

This involves a consideration of the findings and parts thereof objected to by Appellants.

11. Are the "conclusions of law" supported by the law, or are they contrary thereto?

This involves a consideration of the "Conclusions of Law" and a determination of whether the trial court correctly applied the proper law to the facts.

12. Did the Court err in denying Appellants' motion for a new trial?

This involves a consideration of the evidence, the law, the various rulings of the trial court, the motion for new trial and the affidavits in support of and in opposition thereto.

SPECIFICATIONS OF ERROR.

1. The Court erred in admitting opinions of experts in answer to *hypothetical* questions, for the purpose of showing that an *actual* German Declaratory Decree was *erroneous* according to German Law. Said Decree determined Joe May to be the owner of the Judgment sued upon.

Appellants objected (but were overruled) throughout this entire line of questioning on the following grounds:

(A) "I object to it as incompetent, irrelevant and immaterial. Counsel does not recite the full facts in the question involved here. It also attempts to express an opinion on or reexamine a judgment which has already been rendered in Germany and has become final. It includes facts not in evidence and omits facts that are in evidence. It particularly does not include the fact that the sole director of the corporation consented to the particular transaction involved, to-wit, the sale of certain assets to an individual for a consideration, and that these facts have already been judicially determined by a Court in Germany, and it is an attempt to go behind the judgment '. . .' and further that it would attempt to impeach a final judgment." [Tr. pp. 318, 319.]

The full substance of the evidence admitted over this objection, was the experts' opinion of the effect of German law *upon the facts disclosed in the declartory relief action* [Pl. Ex. 3 and 4, R. pp. 204-241] as follows: That although the written agreement (shown in the judgment roll) between Joe May (sole stockholder) and one Aussenberg (purchaser of half of May's stock), whereby the former was to acquire certain corporate assets (including

the claim resulting in judgment sued upon) was consented to by the said corporation and to whom the consideration was paid, said agreement was insufficient *according to German Law* to actually transfer said claim to May; that a formal assignment was necessary for said purposes. [R. pp. 321-325.]

(The above opinion was in direct contradiction to the actual German final decree which held under these facts that Joe May did become the owner of said Judgment, and that said judgment roll disclosed that there had been such actual assignment made. [Pl. Ex. 4, R. pp. 228, 229.]

(B) Appellants further objected and were overruled when the expert was shown the *exact written agreement* in the judgment roll *and the final decree* (adjudging Joe May the owner) and was asked if he had an opinion as to whether that agreement and the facts as shown *in said judgment roll* "would be effective under the law of Germany to transfer or assign to Joe May the claim of Mayfilm against Universal." The grounds of objection were: "To which we object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial. The particular ground that we would like to rely upon here, in addition to the general objection, is that it attempts to go behind a judgment. The documents that have been read are contained within a judgment roll upon which a judgment has been rendered by a Court of competent jurisdiction. The witness is now asked to decide whether or not that judgment of that Court is proper." [R. p. 334.]

The expert gave his opinion as follows: That the written documents *and facts recited* in the actual judgment roll

were ineffective as a transfer of the judgment to May, *under German Law;* that a formal assignment was necessary. (This opinion evidence likewise attempted to "reverse" that final German decree by attempting to show that the German Court was guilty of judicial error, and further sought to contradict "by a legal opinion" the existence of a fact disclosed in the judgment roll, to-wit, that there was an assignment from the Corporation to May.)

2. The judgment herein is based upon findings of fact, which, in material matters are not sustained by the evidence, and are contrary thereto. Such material findings and the particularities wherein same are erroneous, are as follows:

(A) That portion of Finding No. III [R. p. 36], reading: "Under and by virtue of the law of the German Reich said judgment, and the claim on which it was based, were and at all times since have remained, the property of Mayfilm A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its renditon has been and is now enforceable against the judgment debtor, or its successor, only by Mayfilm A. G., the judgment creditor," is erroneous:

Said portion of the finding is contrary to the evidence. Said evidence consists of: (1) the judgment roll of the judgment sued upon, (2) [Pl. Ex. 2, R. pp. 106-199]; the judgment roll of the declaratory relief action [Pl. Ex. 4, R. pp. 204-241], (3) oral expert opinion testimony.

The judgment roll, relating to the Kammergericht [Pl. Ex. 2] shows: the defendant therein objected that the

plaintiff therein (Mayfilm Corp.) was "not the *proper party*" since the claim was in reality owned by Joe May. [R. p. 127.] That the testimony of Joe May therein was to the effect that he owned the claim, but that the suit thereon was to be "continued" by the plaintiff corporation [R. p. 118] that the Court's "Grounds of Decision" stated that the plaintiff was the *proper party* [R. p. 128], that it "was assumed" that when liquidation was completed, the proceeds of the judgment should be transferred to May; that *distribution of assets among* "associates" before corporation's debts were paid would be *invalid,* as to the corporation's *Liquidator.* Said Kammergericht "Grounds for Decision" however were silent as to a *sale of assets* for a *cash consideration.* That issue was never raised therein. (It should be noted here that when the German Supreme Court denied a revision of the Kammergericht judgment, its decision showed that it considered all the evidence, and in affirming the Kammergericht judgment the Supreme Court declared its own "Grounds of Decision" in which the incidental question of "proper party" or the ownership of the claim was not considered or determined.) [R. pp. 177 to 196.]

The final decree of the Landgericht [Pl. Ex. 4] in the declaratory relief action shows; this decree was rendered February 11, 1935 [R. p. 226], *3 years and 5 months after the renditon of the Kammergericht judgment of July 27, 1932;* that the parties thereto were the Bank for Foreign Commerce as assignee of Joe May, and the Mayfilm Corporation, by its Liquidator [R. p. 205]; that the subject matter of the suit was the ownership of the judgment sued upon herein [R. p. 206]; that the Bank and the

Mayfilm Corporation by its Liquidator each asserted rights of ownership of said judgment [R. p. 207] and that the decree of said Court was that there was a sale and assignment thereof to Joe May by the Mayfilm Corporation [R. pp. 228-9] that Joe May was the owner [R. p. 226]; that the corporation was not the owner of the judgment and therefore Joe May's assignment thereof to the Bank was valid. [R. p. 227.] Said judgment roll in the declaratory action further shows that: June 30, 1930, Mayfilm Corporation had no debts other than to the Bank [R. 208]; it had assets of 113,755.54 R. M.; that August 15, 1930, said corporation became active with assets of 105,004.10 R. M. [R. p. 208]; that at the time Joe May bought the claim said suit was of uncertain value as it had been lost in the first trial [R. p. 209]; that on May 30, 1932, Joe May assigned the claim against Universal to the Bank; that on August 29, 1930 (the date of the purchase of the claim by May from the corporation) there were *no* creditors as per the balance sheet attached thereto* [R. p. 211]; that at the time the Kammergericht held the "transfer of the said claim" to Joe May was subject to the payment of creditors, the Kammergericht failed to go into the question of the existence of creditors, and therefore its remarks thereon are "dicta"; that in its "grounds for decision," said Landgericht adopted and incorporated therein the statement of a witness to the effect that: It was correct that there *was assigned* to Joe May, in accordance with the agreement and said balance sheet, in consideration of the payment of 45,000 R. M.,

---

*Said balance sheet was discussed by the experts as will appear later.

said claim against Universal [R. pp. 228-229], that only as a matter of form was the lawsuit conducted in the corporation's name [R. p. 229] that Joe May paid all costs of the suit and furnished the information regarding it [R. p. 230]; that proof of the allegations of the complaint has been made. [R. p. 230.]

The oral opinion of the experts for appellees included: an admission that the declaratory decree established that the claim in question was owned by Joe May [R. p. 338]; that it *"created law between* the two litigant parties" (Joe May's assignee, and the Mayfilm Corp. by its Liquidator) and further that said decree "concerns the relationship between the Bank . . . and Mayfilm A. G. (corporation) *and to that extent it establishes that the claim is owned by Joe May. That is the meaning of this judgment"* [R. pp. 339-340]; that said decree is "binding upon these two parties" [R. p. 342]; that from the standpoint of American Law, of *res judictata,* the effect in Germany of a judgment there is that "they bind the persons who are parties and their privies" [R. p. 369]; that regarding the corporation's balance sheet referred to *supra* that it "does not mention the claim against Universal" [R. p. 336]; that if Miss Loewenstein (the director of Mayfilm Corp.) assented to the agreement between May and Aussenberg and further said, "I, as only member of governing body assign the claim to you—Joe May," "this would be a real assignment *and it isn't necessary that it be written."* That any simple words indicating the intent to assign would be good, *that it isn't necessary to use the word 'assign'."* [R. pp. 456, 457.] (Note: See testimony of Miss Loewenstein in [Pl. Ex. 4, R. p. 228] *i. e.,*

"Grounds for Decision" in Declaratory Decree action, reciting that "It is correct that there was assigned to . . . Joe May in confirmance with the agreement with . . . Aussenberg and the . . . balance sheet . . . the claim against Universal . . ." See also her testimony therein [R. pp. 236, 7] to same effect. See also recital of same fact of assignment in the Decree under heading of "Facts." [R. p. 227.]) In the position asserted by Mayfilm Corp. in Liquidation, in the Declaratory action, that corporation admitted that there had been a valid assignment of certain assets by the corporation to May, but it was claimed that they did not include the claim against Universal. [R. pp. 215, 216.] The Court's decree was that the claim against Universal *was included* in those assigned assets. One of appellants' experts testified that: On the balance sheet of the Mayfilm Corporation, the claim against Universal is not included; that *by law,* such balance sheets *must* include all assets. [R. p. 499.] One of appellants' witnesses testified: that he was the attorney in Berlin for the Bank; that he had personal knowledge of all facts in connection with the declaratory action; that not only from his knowledge of all the facts themselves, but also because he was versed in German law, the claim against Universal had been validly assigned to Joe May by the Mayfilm Corporation and that that was also the conclusion of the German Court in that action. [R. pp. 488-9.] Another of appellants' experts stated in response to a question as to the effect of the declaratory decree that: "In a German case . . . such judgment would produce more than an assignment." That such decree would have the effect of "an assignment which has

been confirmed by a Court. In a case it would be evidence." [R. pp. 530, 531.]

Further said portion of finding No. III is not supported by the evidence;

The only evidence offered by Appellees to support the issue covered by that portion of the finding No. III objected to, was the opinion testimony of their experts given in response to hypothetical questions, wherein they stated that the facts as disclosed in the judgment roll of the German Declaratory Decree were insufficient to transfer title of the claim to Joe May. [R. pp. 319-338.] Said experts did admit, however, that under German Law said Decree did establish that as between the litigant parties and their privies, that the claim was owned by Joe May; that said decree *did create law* between said parties [R. pp. 339, 340], and was binding upon them. [R. p. 342.]

(B) Finding No. V [R. p. 37], in its entirety, is erroneous;

Said finding is contrary to the evidence:

The evidence hereinunder is the same as that set out hereinbefore in connection with appellants' objections to a portion of finding No. III and is incorporated hereinunder by this reference thereto, to save space and needless repetition.

Said finding V is not supported by the evidence:

The only evidence received on the issue covered by the finding is the same as that received in connection with finding No. III, hereinbefore set out under appellants' objections thereto, and is incorporated herein by this reference.

(C) Finding No. VI, [R. pp. 37-38], is erroneous.

Said finding is contrary to the evidence:

The only evidence appellees may rely upon, is a portion of the Kammergericht judgment roll denominated "Grounds for Decision." [R. p. 128, already set out under Spec. 2, Subsection A.] The error of said finding is: It is based upon *superseded* "Grounds for Decision" which were neither included nor affirmed in the *final* "Grounds for Decision" of the Reichsgericht; it relies upon mere dicta; it confuses said Grounds or dicta as follows: (a) that a "distribution of all assets" to stockholders upon final liquidation is the same as a "sale" for cash of a *portion* thereof, (b) that the issue of proper parties" is the same as the issue of "ownership," (c) that it interprets the "Grounds" into a conclusive determination" of the rights of a person (not a party thereto, *i. e.,* May.) Finally, said finding fails to consider and is contrary to the facts of event occurring after the Kammergericht decision, to-wit: the final Decree of a German Court of competent jurisdiction, which did in fact finally determine the issue of ownership between said corporation and May's assignee.

Said finding is not supported by the evidence:

The substance of the evidence on the issue covered thereby has already been set out hereinabove and is incorporated herein by this reference. The insufficiency of the evidence is that the finding is based upon portions of the "Grounds for Decision" in the Kammergericht judgment, which were not final, and were superseded by the Reichsgericht "Grounds" which are final, and in which no support for said finding can be found.

Further, even if said Kammergericht "Grounds" were deemed effective; they fail to support said finding in that said "Ground" merely answer the defendants' objection therein to the plaintiff being the "proper party" [Pl. Ex. 2, R. p. 127], and *that* was a special issue before that German Court; it did not purport to adjudicate the *ownership* of the claim as between Mayfilm and Joe May, which latter was not a party in that action.

Said finding is further erroneous as to that portion relating to the "conclusiveness" on the issue of ownership as between Universal, Joe May, *their successors* or claimed successors, in that the same constitutes a naked erroneous conclusion of law and as such ignored the legal effect of the subsequent decree both under German and American law.

(D) That portion of Finding IV, [R. p. 36-37] reading as follows: "Under and by virtue of the law of the German Reich said declaratory judgment . . . had no effect upon their (defendants) or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein" is erroneous.

Said portion of said finding IV is not supported by the evidence. Since the evidence applicable has already been set out under objections to Finding No. III, in order to save space same is repeated herein by reference thereto, as found under Specification 2, Subdivision A.

In particular, appellees' witnesses *did not* testify that the defendant had any rights in the claim or judgment. Defendant became debtor under the judgment and as such *was not claimant of title to a judgment against itself.* Nor is there any evidence to substantiate the conclusion that the declaratory Decree was and is not evidence against the defendant herein of any of the facts or issues determined therein. Appellees' witness admitted that said Decree established, as between the corporation and May's successor that the claim was owned by May. [R. pp. 339, 340.]

The only evidence on the evidentiary effect of the decree in Germany, according to German Law, was that of appellants' witnesses who stated that such decree was good evidence in Germany of an assignment which had been confirmed by a German Court. [R. pp. 500, 501; 530-531.]

Witnesses for both parties herein admitted said Decree was binding upon the parties and their privies in that action, and that it established the German law as to them. The effect of such Decree and law, *as evidence in this action,* must be determined by the law of the forum, to wit, California Law.

Said portion of said "finding" is contrary to the evidence for the same reasons as immediately set out hereinabove.

(E) Finding No. VII [R. p. 38], is erroneous in its entirety.

The substance of the evidence thereunder is: *Mayfilm Corp. in liquidation* obtained a line of credit of 100,000 M. in 1931 from the Bank. [R. p. 273; 275.]

Joe May, who had *purchased* for 45,000 M. certain assets from the corporation in 1930, *including among those assets a then defeated 50,000 M. claim against Universal* [R. pp. 210-212] assigned this *claim* "as security" to the Bank on that *loan to the corporation,* and in addition thereto, he, May, *and one Mandl* further guaranteed this loan [R. pp. 261, 2; 280, 281.] Said Bank acknowledged that said assignment by May was by way of security only. [R. p. 246.]

On February 9, 1933, the *claim* having ripened into a final judgment against Universal, May made a further assignment thereof to the Bank, "as security." [R. pp. 245-6; 295-6; 482.]

When Mayfilm Corp. failed to repay the loan to the Bank, the latter required Mandl to pay under his guaranty, which he did in 1936, [R. pp. 246; 281], in the amount of 64,200 M. [R. p. 482.] Said Bank upon receiving payment from Mandl, *actually assigned* the claim against Universal, to Mandl, [R. p. 264-9; 270], and further notified said Universal on February 12, 1936, that Mandl had paid them, that the judgment against Universal "has been . . . transferred to Mandl" and that the judgment could be satisfied by payment only to Mandl. [Pl. Ex. 11, R. pp. 295, 297; Pl. Ex. 5, R. pp. 246-7.]

Appellees offered no evidence of any facts controverting the foregoing statement of events, but did offer *opinion* evidence to the effect that an actual assignment was necessary to transfer the claim against Universal from the Bank to Mandl, that those facts immediately above set out failed to act as such assignment, that the Bank's

written notice to Universal was insufficient as an *actual* transfer, and that there was no transfer as the result of operation of German Law.

Appellees' witnesses conceded that under these facts, Mandl was entitled to " receive" such transfer [R. pp. 354, 356]; that although the "notice of transfer" was not effective as a transfer, *had Universal paid the judgment to Mandl, they would have been "protected" thereby as against the Bank* [R. p. 349]; that in considering the effect of the wording of the "notice" to Universal, explicit words of transfer were not required under German Law [R. pp. 460; 494, 5]; that those words used therein did constitute an admission against the Bank's interest to the effect that the Bank was no longer Universal's creditor, but that Mandl was, and the Bank "wants" Universal to pay Mandl [R. p. 349]; that in a real assignment express technical words of assignment are not required, and that even an *oral* assignment is good under German Law. [R. pp. 378; 456, 457.] Appellees' witnesses further stated that a judgment as such is not assignable in Germany, but the *claim* upon which it is based may be assigned, even orally, and the title to the judgment follows the claim. [R. pp. 391-392; 328.] They further stated that the following law appears in Section 409 of the German Code. "If the creditor informs the debtor that he has assigned the claim, the notice of the assignment is valid against him, as towards the debtor, *even though the assignment had not been made or is ineffective. It is equivalent* to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the lat-

ter presents it to the debtor. *The notice can be withdrawn only with the assent of the party who is named as the new creditor.*" [R. p. 439.] (Italics ours.) Also, that Section 410 which requires a debtor to recognize such new creditor only if he is furnished with the assignment provides: "These provisions have no application if the former creditor has notified the creditor in writing of the assignment." [R. p. 440.]

On the issue of *actual assignment* by the Bank to Mandl, appellants' evidence was as follows:

Mandl, himself, testified that the Bank *gave him an assignment of the claim* [R. p. 264]; *that the assignment of the claim was made to him, by the Bank after he had paid on his guaranty,* [R. p. 270.] This evidence was never denied or controverted or disputed by appellees. Appellants' experts stated that an *actual* assignment was not required under German Law [R. pp. 490-5], that the "notice" in itself was a valid assignment from the Bank to Mandl [R. pp. 490; 531-3; 536; 245; 295]; that even if the "notice" contained a reference to an assignment by operation of law, or mistakenly gave as a reason or basis the Code Section 744, that because the intent of the parties was clear [R. p. 495] that under German law the intent ruled. [R. pp. 495-6.]

On the issue of "transfer by operation of law" appellees' witnesses advanced two theories: (a) Security deposited by a debtor passes to the paying guarantor by "operation of law," *only if* the guarantor occupies the position of a "surety," but not if he is a "warrantor." [R. pp. 344; 370, 371.] The distinction, according to the witnesses, was that a "surety" ("Burgchaft") is one

who obligates himself to the creditor of a third person to answer for the debt of the latter; that a warrantor ("guarantie-versprechen") is one, who, by an independent contract, unconditionally guarantees a given result. [R. pp. 343; 369, 70.] With respect to what Mandl's position was said witnesses stated "it was not clear" *but admitted that the Bank in its notice had designated Mandl by the German word "Burgschaft" meaning* "surety," [R. pp. 346, 7; 418], (b) the second theory was that only a "pledge" passes "by operation of law," and that an "absolute assignment" does not, as the latter requires an *actual* assignment to the guarantor. That if the assignment of the claim against Universal from May to the Bank were "as a pledge" it would have been transferred to Mandl, by operation of law, when Mandl paid the Bank, [R. p. 492], but that in their opinion May's assignment to the Bank "was absolute upon its face" and therefore to transfer it to Mandl the Bank should have made an actual assignment. Said witnesses did however admit the following; that an assignment of a claim to a Bank does not need the words "as security" to nevertheless be a limited assignment [R. pp. 401; 404-405; 406; 407]; that May's assignment would be interpreted as having been given "as security," [R. p. 411]; that the "form of making an assignment as a "pledge" or "as security" is the same [R. pp. 406, 7], that a "claim can be pledged" by an assignment, [R. p. 406]. The witness himself stated that "he" would also add the words "I assign as a pledge" or similar words "to show the real intent" and that the reason for the difference between "pledge" and "assignment as security" was "for the out-

side world" in that the holder thereof is restricted in his handling of pledged property [R. p. 408] and the same witness admitted that one who has received something by "an assignment for security" is also restricted in his handling thereof. [R. p. 410.]

Appellees' witness Golm, conceded that if A (debtor) owes B (creditor) and C (guarantor) assigns to B, "as security" a claim C owns against X, that if C were a *"surety"* it is a case under Section 774, but if C was a third person, under no obligation to B, and "just wanted to be helpful" (volunteer) there would be no transfer by operation of law, because one who puts up security "WITHOUT BEING A SURETY" is not protected by Section 774. [R. p. 430.] Said Section 774 provides: "Insofar as the guarantor satisfies a creditor, the claim of the creditor against the principal debtor is transferred to him, and the transfer cannot be claimed to the detriment of the creditor. Any objections of the main debtor, from a legal relation existing between him and the guarantor, are not affected."

To be applied to Section 774, per Section 412, is Section 401 stating among other things that as to transactions under Section 774, that "with the assigned claim the mortgages or liens, *belonging to it, as well as the right arising out of a security given for it, are transferred to the assignee.*" [R. p. 434.] (Italics ours.)

Notwithstanding said code law, one of appellees' witnesses stated he based his opinion that the transfer did not occur by operation of law on a case in Germany [D's Ex. E, R. pp. 542-547; 352-3], and the other expert stated he relied greatly thereon for his opinion.

[R. p. 371.] Said witnesses admitted however that even Supreme Court decisions are not effective in Germany to negate or overrule the Code Law. [R. p. 468.] (The trial Court stated in overruling the appellants' objection to the use of said German case, that that decision was not binding, *and was only to be used as the basis for the witness's opinion.*) [R. p. 353.]

The German case so used by appellee's witnesses as the basis for their opinion was as follows: A debtor had assigned "as security" some shares *of stock* to his creditor. A guarantor entered into a *specific written contract* under which the creditor agreed that as and when the guarantor paid the debt, "the shares" *"were to be assigned"* to the latter. Guarantor, after he had paid the creditor, evidently realized he had made a bad bargain, attempted to get his money back from the creditor by advancing a spurious claim to the effect that since the written agreement was a contract to "buy" stock it was *void unless notarized.* The Court quickly rejected this claim by distinguishing the written contract of "guaranty" from one of *"sale,"* and held that a contract that required a creditor to *assign* stock to the guarantor *upon payment of his guaranty obligation* did not need such authentication. *The strict rules and formalities applicable to agreements to buy stock were not applicable.* The creditor in that suit, evidently, out of an abundance of caution presented a further argument to the effect that a written contract was unnecessary because the transaction came under Section 774, Civil Code. The Court held that the theory of transfer by operation of law was unnecessary, not only because the "owner

. . . was ONLY *obligated by contract* to reassign the shares, it is not permissible to apply *directly* Sections 401, 412, of the Civil Code," but also because Sections 157 and 242* of the Code applied in that "the creditor as owner by way of security MUST TRANSFER" to the guarantor who "consented in advance" *according to contract;* and also the obligation to "transfer" was a "self evident consequence of the legal relation." *"However, in their economic effect, a transfer of ownership as security and the giving of a pledge are very similar or even coincide."* (Italics ours.)

First appellants suggest that appellee's witnesses made a distinction that is not borne out by the case. This distinction was to the effect that an assignment for security is greatly different from an assignment as a pledge. In answering a question on the meaning of the words May used in his assignment to the Bank, appellee's witness Golm said, "It convinced me that it was assigned absolutely as security. We have this assignment as security. But it wasn't a pledge. It is just the opposite of a pledge." [R. p. 401.]

The case used as the basis for the witnesses' opinion however does not make any such distinction. Quite the contrary, it states that assignments as security or a pledge are practically the same and *"even coincide."* This being true we submit that if in one instance the security passes by operation of law, it does so in the other instance as well.

---

*[This section may be found in R. p. 443]; Section 157.

"Contracts are to be interpreted as good faith and credit with due regard to commercial usage required"—Loewy. "Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration"—Chung-Hui Wang.

It is further suggested that this case "used as the basis of the experts' opinion" was applicable only to a situation where there was a written contract to transfer *shares of stock,* between individuals, which, according to that case, required rigid formalities, whereas a transfer of a claim (and the judgment based thereon) is not subject to the same formalities, as it admittedly could be transferred by mere "oral" assignment.

Appellants' witnesses testified on this question that transactions in Germany between a Bank and its customer were informal, [R. pp. 497-8], that such transfers of securities were handled with "as little formalities as possible," [R. p. 493], and therefore said witness gave his opinion that the situation in the above case was not applicable to Bank transactions and did not apply to the transactions between the Bank and Mandl. [R. p. 493.] German law requires that all contracts "shall be interpreted according to the requirement of good faith, ordinary usage and *business usage* being taken into consideration" *per appellees' witness.* [R. p. 443.]

Appellants' evidence of the *facts* of Mandl's transaction with the Bank was never controverted by evidence of any other facts nor did appellees deny or disprove the existence thereof. Said evidence showed that Mandl *guaranteed* the obligation of *another person* (rather than warranting a given result) [R. p. 261], that by German Law, Section 765, a person who obligates himself to a third party's creditor to answer for the debtor's debt is a surety, [R. p. 342], and that the Bank's notice to Universal stated that Mandl, as "Burgschaft" ("surety") paid the debt and was therefore "subrogated"

to the Bank's rights against Universal. [R. pp. 246; 346, 7; 418], and the claim against Universal was transferred to Mandl. [R. pp. 295-6.]

Appellants' testimony on the nature of the assignment from May to the Bank was to the effect that in all transactions the type of the transaction and the identity as well as relationship of "parties" must be considered in any interpretation; that there is a difference between an agreement between "two postmen" and an agreement where a Bank is involved; that the assignment from May to the Bank would be that "this is a security; this is a pledge; this would be *prima facie* evidence *because of the parties involved.*" [R. p. 532.] That the transfer to the Bank was in "connection with same transaction." [R. p. 532.] That "it is 999 times in a thousand that it has to be a security." [R. p. 533.] This testimony as to facts was never rebutted. Another witness, the Bank's (then) attorney, testified: The assignment of the claim by May to the Bank was done in the "usual way between Banks and their customers for years and years, to give security by transfer of title for debts instead of making only a pledge. [R. p. 490.] "You can give a 'pledge' or make a transfer of title, but in fact, the intention of the parties is only to make a pledge. *It appears like a transfer of title but in fact is a pledge.*" [R. p. 491.] That under German Law, regardless of what the words themselves recite, *"it is allowed to show that something what appears to be a transfer of title is, in fact, a pledge.* But let me add that not in one out of hundreds of cases would there be a discussion, because everybody knows that a paper like this is only a so-called 'sicherungsuebereignung' and doesn't intend to be more than a pledge." [R. p. 491.]

That "as to my knowledge *as legal adviser to the Bank*, it is always the meaning, the intention of the parties, in pledging property in the form that transfers the title, that after payment of the debt there shall be as little formalities as possible." If May had paid this debt himself the Bank would never have had to reassign—*maybe it would tear up or give back the original assignment, but it would never be necessary to make a reassignment.* [R. pp. 493-4.] That in this case, because a Bank is involved, because the intention of the parties was clear, there was an assignment by operation of law, and an actual assignment was unnecessary, but the notice from the Bank to Universal "now stands as an assignment, although it is superfluous as an assignment." [R. p. 494.]

Further said finding VII is contrary to the evidence in that there was uncontroverted evidence of an actual formal written assignment *of the claim* and judgment from the Bank to Mandl. [R. pp. 264-270.] It is further contrary to the evidence of the notice itself. [R. pp. 245, 295.] Although the effect of this notice under German Law was disputed by the experts, there is no doubt that under American Law said notice is a valid assignment in that the Bank directed Universal to pay Mandl, and that the judgment could be satisfied *only* by payment to him. Said notice was directed to Universal at *New York, U.S.A.*, and thereby fixed the place of performance at the debtor's residence. The notice further shows that Mandl was a non-resident of Germany.

3. Certain "findings of fact" as hereinafter designated are not sufficient either in form or content to

legally constitute true findings of fact, and are in reality mere naked conclusions of law, leaving it doubtful what particular facts therein referred to were established.

The findings objected to are those portions of IV as set out under Specification 2D, and all of Finding V [R. p. 37] and all of Finding No. VII [R. p. 38.]

An examination of the portion of Finding IV objected to disclose that it is not a finding of the ultimate facts, and merely purports to draw a conclusion of the facts found in the first portion of said Finding IV relating to the Declaratory Decree. The statements therein that the Decree "was not evidence against defendants herein" that it was not conclusive or binding on them or had no effect upon their rights are all naked conclusions.

A further objection to said Finding IV is that the statement that the Decree was "not evidence against defendants" is a question of law and not a question of fact. Therefore as such it has no proper place in findings of fact.

Said portion of Finding IV is further erroneous in that it applies the law of Germany, instead of the American law, in determining the evidentiary value and effect of the final declaratory decree. Under the applicable American law said decree is evidence for the plaintiffs and against the defendant (appellant) herein.

Finding No. V, stating that Joe May did not acquire or succeed to the ownership of the Judgment, again merely states a conclusion of law purporting to state the *legal effect* of various transactions. Further said "finding" in the last sentence thereof states that certain facts

upon which succession is claimed fail to transfer the judgment, but nowhere in said or any findings is there any definite reference to these facts, nor any description thereof, nor any finding as to their existence. Therefore said "finding" is too indefinite to be of any avail herein.

Finding No. VII recites that "none of the transactions had" between or among Joe May . . . the Bank . . . and . . . Mandl *had the effect* of transferring or vesting in . . . Mandl . . . the judgment . . . of the claim. . . . The court's "finding" further stated that the "facts" . . . did not "*have the effect*" under German Law of transferring or vesting in . . . Mandl any part of the Bank's interest in the judgment or claim.

It is self-evident that these statements are not findings of ultimate facts but are mere naked conclusions of law particularly insofar as they state the *effect* of the facts rather than stating what the facts were. Further it is obvious that the court drew legal conclusions from some facts, but fails to find or state what those facts were. The first portion refers to "transactions," the second part refers to "facts as a result of which" certain claims are made, yet neither portion definitely refers to either what those "transactions" or "facts" were, nor describes them, nor their existence. Therefore and further, said "finding" is too indefinite and vague to support the judgment.

4. The Conclusions of Law, [R. p. 39], are, and each of them is, clearly erroneous in the following particulars:

Conclusion of Law No. 1, [R. p. 39], to the effect that "Neither plaintiff or any of their predecessors in interest

(other than Mayfilm A.G.) had or have any right, title or interest in or to the judgment sued upon, or in and to any part of the claim upon which said judgment was based," and Conclusion of Law No. 2, [R. p. 39] to the effect that "plaintiffs are not entitled to enforce said judgment" and Conclusion of Law No. 3, [R. p. 39], to the effect that "defendant is entitled to judgment, that plaintiffs take nothing and that defendant recover its costs" are, and each of them is clearly erroneous in that the same are (a) contrary to the evidence; (b) not supported by the evidence; and (c) contrary to law.

The evidence hereinbefore set forth, under Specification No. 2 shows that Mayfilm Corp., no longer was or is the owner of the judgment sued upon, or the claim upon which it is based; that the same was transferred from Mayfilm Corp. to Joe May firstly by purchase and assignment, and most certainly by the declaratory Decree; that the same was assigned by May to the Bank and by the Bank to Mandl, and by Mandl to the Union Bank and by the Union Bank to the plaintiffs. (Appellants.)

Said conclusions are and each of them is contrary to law in that they, and each of them, erroneously fail and refuse to give any legal effect to the declaratory Decree as *evidence* in this case; erroneously fail and refuse to give any legal effect to the actual assignment from the Bank to Mandl; erroneously fail and refuse to give any legal effect to the "notice" from the Bank to Universal as an equitable assignment under American Law, or any effect under German Law; erroneously interprets the German Code Law; fails and refuses to give any legal effect to the assignment from Mandl to the Union Bank

or from the Union Bank to the plaintiffs; and lastly under the *evidence* in this case, and the law, the plaintiffs are entitled to judgment against the defendant.

5. The judgment herein is contrary to and is not supported by the evidence.

Since the basis of Appellants objections hereunder are the same as those set out under Specification No. 2 reference is hereby made thereto, and incorporated hereinunder.

6. The judgment herein is contrary to law in that the Court:

(a) Erroneously held that the Decree constituted no evidence for appellants against the appellee. (Said Decree, by law, was *prima facie* evidence of muniment or link in the chain of or foundation of title and in the absence of evidence to the contrary (of which there was none), is conclusive on the defendant on the question of ownership as between the parties who litigated that question.)

(b) Erroneously fails to hold that there was an actual assignment from the Bank to Mandl, or that there was an assignment by operation of law.

(c) Erroneously held that the Kammergericht "Grounds for Decision" was *res adjudicata* against appellants upon the question of ownership of the judgment sued upon.

(d) Erroneously held that neither the appellants nor any of their predecessors in interest, other than Mayfilm Corp. have or had any title or interest in and to the judgment sued upon, or in or to the claim upon which it is based.

(e) Erroneously failed to render judgment in appellants' favor for $24,337.76.

7. The Court erred in restricting the determination of Mandl's rights with respect to the assignment from the Bank to Mandl to that alleged in the pleadings, to-wit: that of "operation of law" only. [Court's opinion, R. pp. 32-33, also R. pp. 402-3.] Evidence received developed the fact that there was an actual assignment. It therefore became incumbent upon the Court to make findings of fact and conclusions of law on the issue thereby created.

This issue of actual assignment was first raised by appellees by adducing testimony to the effect that the notice itself, in their experts' opinion, was not effective as a transfer or assignment of the claim to Mandl. [R. pp. 348, 9.] Appellants were permitted without objection to meet this issue, [R. p. 494], and in fact said issue was further developed by the Court itself through its own interrogations thereon. [R. pp. 495, 96.] In addition to the above appellants introduced the uncontradicted statement of Mandl that there was an actual assignment made. [R. pp. 264; 269-70.] No findings were made in respect to this issue.

8. The Court erred in denying appellants' motion for a new trial.

Said motion is set out on R. pp. 42 to 61, incl., and the affidavits in support thereof are at R. pp. 61 to 77; affidavits in opposition thereto are on R. pp. 78 to 83, incl., and the ruling thereon at R. p. 90.

ARGUMENT, POINTS AND AUTHORITIES.

I.

The Court Erred in Admitting Opinion Evidence Attempting to Show the German Declaratory Decree Was Erroneous. (Specification 1.)

The Court's attention is directed to two outstanding initial facts: Firstly, Universal, in the case at bar, was the original judgment debtor in the German case in which was rendered the judgment sued upon. Neither in that action, or the present one did it *have,* or *claim any rights to the ownership of the claim or to the judgment.* Secondly, the declaratory Decree was rendered in a subsequent action to determine the ownership of the judgment. The parties were the only two possible claimants thereto, to-wit: the Mayfilm Corp. (the original judgment creditor) and the Bank, which claimed under an assignment from May, who had purchased the claim from Mayfilm Corp. The primary question, in the declaratory action, on the issue of ownership, was whether those various assets *admittedly sold to May by the Mayfilm Corp.* included the original claim against Universal. The Court therein determined that the claim was so included. Thus, said decree merely determined *who* the judgment creditor was, and did not decide any issue or any point which directly or indirectly prejudiced any "rights" of the judgment debtor.

The appellee's objection to the Decree, as disclosed in their answer, was that the same was not binding upon appellee as it had not been a party to that action, and had no knowledge thereof. [R. pp. 19, 20.]

Appellee sought to prove by opinion evidence that the *facts* upon which the decree was based, were *insufficient* (under German law) to support said Decree, and because appellee was not a party to that action, it claimed the right to attempt to show that said Decree was erroneous.

Such evidence was not admissible to impeach the Decree. It attempted to re-examine the facts, and to re-construe and re-litigate them, and thereby show that the legal effect thereof was different than that decreed by the German Court. In short, it attempted to show that the final Decree in that action was "erroneous."

It is well established that strangers to a judgment—that is persons who are not parties or privies—though not bound by it operating as *res adjudicata*—nevertheless cannot attack it collaterally. The exception to this rule is not material here, as it provides that strangers may attack judgments in a limited manner, only if they had existing rights that were prejudicially affected thereby. This rule is stated in 15 *Cal. Jur.* 55, par. 142.; *Bennett v. Wilson,* 133 Cal. 379, 65 Pac. 880; *Mathews v. Hensen,* 124 N. W. 1116, at 1119; 19 N. D. 692; *Nankivel v. Omak, etc.,* 197 N. Y. S. 467, at 470, 203 A. Div. 740; *Cooke v. First Natl. Bank,* 236 Pac. 883, 110 Okla. 111, at 886; *Abbington v. Townsend,* 197 S. W. 253, 271 Mo. 602; *McEven v. Sterling Bank,* 5 S. W. (2d) 702, at 707; 34 C. J. 526 and 527; Freeman, Judgments, Vol. 1, pp. 636-39.

In *Hunt v. Loucks,* 38 Cal. 372, at page 382, the Court in comparing executions to judgments, said in reference to the "erroneousness" thereof that "it cannot be brought into question even by a party to it, much less, as

in this case by a stranger. Even directly it cannot be attacked by a stranger for it does not lie in the mouth of A to say, by it, B has been made to pay too much money, and therefore all proceedings under it are null and void. That is a question that concerns B only, and if he is content, A cannot complain."

In *Bennett v. Wilson, supra* 133, Cal. 379, at 384, the Court approving Freeman on Judgments states: "The parties to an action * * * and all persons, who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the Court without jurisdiction, and the judgment absolutely void as between the parties thereto." Generally, regarding judgments, "they cannot be impeached otherwise than by the record itself, or where lack of jurisdiction appears on the face of the record."

In 34 *Corpus Juris,* 526, 27, citing *Agoure v. Peck,* 17 Cal. App. 759 (121 Pac. 706), in discussing the rule concerning collateral attacks on judgment by a stranger, states that with respect to the judgment "he cannot object to it on account of mere errors or irregularities or for any matter which might have been set up in defense to the original action." The above case further states: "However erroneously the Court may have acted in the premises, it being within its jurisdiction to make the order, its order is not absolutely void. (*Rowe v. Blake,* 112 Cal. 644, 44 Pac. 1084.) In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. (*Hunt v. Loucks,* 38 Cal. 382, 99 Am. Dec. 404.)"

The Courts of late have gone even further to hold that a judgment *void on its face* which parties and their privies could always attack collaterally that "as to strangers * * * a different rule obtains. They may attack a void judgment only when, if the judgment were given full effect, some right in them would be affected by its enforcement." (Authorities cited) *Mitchell v. Auto, etc.,* 19 Cal. (2d) 1, at page 7, (118 Pac. (2d) 815.)

It is also well established that where a debtor admittedly owes moneys to one of two claimants, and the claimants litigate their respective rights in the ownership of the moneys so owed between themselves, the judgment in that action which determines the rights of the claimants is conclusive upon the debtor in an action by the successful claimant against the debtor and may not be relitigated by him, and he is conclusively bound thereby, notwithstanding that said debtor was not a party to that action. (*Perkins v. Benguet Cons. Mining Co.,*) 55 Cal. App. (2d) 720; 132 Pac. (2d) 70.

The California Appellate Court, in this case considered many issues that are paralleled in the case at bar, *Perkins v. Benguet Cons. Mining Co.,* was decided Nov. 30, 1942, [Appendix pp. 4-10]. In this case cited the plaintiff, Mrs. Perkins, was attempting to collect from the defendant corporation dividends on stock of the defendant corporation. The question of ownership of said stock had been previously in litigation in the New York Courts where it was finally decided that Mrs. Perkins and not her husband, Mr. Perkins, was the owner of the stock and entitled to the dividends. Mrs. Perkins demanded the dividends from the defendant corporation and it

refused to pay. The corporation claimed in its defense that Mr. Perkins was entitled to the dividends as the owner of said stock, and not Mrs. Perkins.

In that trial Mrs. Perkins introduced as the *only evidence of her title,* the judgment roll of the New York case. That New York judgment roll disclosed that Mrs. Perkins and Mr. Perkins were the only parties; that the dispute was over the ownership of the stock; that the corporation was not a party thereto. The New York judgment was that Mrs. Perkins and not Mr. Perkins was the owner of the stock, and therefore she was entitled to the dividends thereon.

In the trial of the California case the plaintiff, Mrs. Perkins, *"offered no evidence of her title to the dividends except the judgment roll of the New York action."* The defendant corporation objected to this evidence, and the objection was overruled, and the New York judgment *"was admitted as competent and conclusive evidence of plaintiff's title."* The corporation next made an offer of proof the effect of which was to show title to the stock in Mr. Perkins and that the New York judgment was *erroneous.* In sustaining objections to such offer, the trial Court ruled "that the New York judgment and every finding upon which it rests was conclusive against defendant (corporation) with respect to everything there adjudicated, *i.e., res adjudicata in the same way as if defendant (corporation) had been a party to the New York action."*

In the Appellate Court's opinion it was stated that "the basic contention of defendant (corporation) is that the judgment of the New York Court is not binding on

it because, * * * *it was* not a party or a privy to a party to that action." Further, several times in the Appellate Court's opinion special reference is made to the fact that the *defendant corporation claimed no interest for itself in the ownership of the stock.* The corporation insisted that the stock really belonged to Mr. Perkins and claimed the right to prove that the New York judgment was erroneous. In answer to these contentions the Appellate Court stated that in New York "Mr. Perkins had litigated the exact question that defendant corporation seeks to litigate here." The question thus presented to the California Court was "whether defendant corporation should not be permitted to litigate those identical issues in California, or whether it is conclusively bound by the New York judgment under the doctrine of *res adjudicata.*" The Appellate Court ruled that the doctrine of *res adjudicata* applied; that "the New York judgment bound the defendant corporation even though it was not a party thereto." The Court reasoned that the defendant corporation claimed no title to stock in itself; it was obligated to perform to Mrs. Perkins; that its "right to attack the New York judgment was no greater than Mr. Perkins' right to do so" and he was conclusively bound by the New York judgment. That since the corporation claimed no interest in the fund itself and was in the nature of a bailee of the funds thereof "every principal of reason, fairness, justice and equity compels the conclusion that it should be bound by a final judgment *between the two disputing claimants.*"

If in the foregoing case we substitute the name of appellants herein for "Mrs. Perkins," the name of Universal for the "Mining Co.," the Mayfilm Corp. for "Mr. Perkins" and call the stock dividends the "judgment claim against Universal" and designate the New York judgment as the "Declaration Decree" we have the case at bar. The chief differences are threefold: In the case cited the California trial Court did not allow the defendant to attack the New York judgment (Decree) by trying to show "in the opinion of experts" that it was erroneous, whereas the trial Court in the case at bar permitted it to be done. Secondly, that in the cited case, the judgment roll was *competent evidence of title* in Mrs. Perkins, whereas in the case at bar the trial Court held that the Decree was in no way binding or conclusive on Universal and constitued *no* evidence of title.

In *Hughes v. United Pipe Lines,* 119 N. Y. 423, 23 N. E. 1042 and *Commercial Nat. Bank v. Allaway,* 207 Iowa 419, 223 N. W. 167, the same rule announced in the *Perkins* case was enunciated and applied. Extensive quotations from each of said cases are found on pp. 749-52 of the *Perkins* case. [See Appendix pp. 8-10.]

The prejudicial effect of the trial Court's error that permitted appellee to re-examine the Decree is forcibly emphasized upon examining the portions of Findings Nos. III and IV as designated under Specification 2 and all of Finding No. V. These findings are clearly based upon the incompetent expert testimony that sought to collaterally attack the Decree.

It is well established that "if a judge in finding facts falls into error by basing his conclusions upon inadmissible evidence, such an action constitutes sufficient grounds for reversal of the judgment on appeal." *Fishbaugh v. Fishbaugh,* (15 Cal. (2d) 445 at 457).

II.

The Judgment Herein Is Based Upon Findings of Fact, Which, in Material Matters Are Not Sustained by the Evidence, and Are Contrary Thereto. (Specification 2.)

A. The parts of Findings No. III and IV as designated in Specification 2A and 2D, and all of Finding No. V (Specification 2B) are so interrelated that they may be treated together. In effect they find that (a) the Declaratory Decree was not and is not evidence against appellees, and (b) was not binding upon appellees; (c) that the judgment or claim sued upon, notwithstanding said Decree, was still the property of Mayfilm Corp. and that Joe May did not succeed to the ownership of the judgment, and (d) by German law the judgment is still enforceable against Universal by Mayfilm Corp. The argument will follow the order of the above points.

The evidence discloses that both parties to this action are in accord on certain results claimed for the Decree, to wit: that under German law it held Joe May (Bank's assignor) "was" the owner of the claim and that his assignment to the Bank was valid; that the decree established the law as between the Bank and Mayfilm; that the Bank and not Mayfilm was the owner of the claim and judgment; that the Decree was final and conclusive upon the parties to that action, *i. e.,* the Bank and Mayfilm.

It is further undisputed that Universal claimed no interest in the ownership of the judgment or claim; and was in effect a mere "bailee" of a fund, and admittedly owed the moneys claimed.

The Decree itself recites that Joe May had purchased among other assets, said claim from Mayfilm, and that the latter had actually assigned the same to said May.

The evidentiary value or effect of said Decree in the case at bar must be determined by the law of the forum, to wit: California. California Code of Civil Procedure Sec. 1915.

> *Sayles v. Peters*, 11 Cal. App. (2d), 401 at 407, (54 Pac. (2d) 94)

cites with approval 78 A. L. R. 884 the rule thus: "Generally, questions of evidence as, for instance, its *admissibility, sufficiency, etc.*, are regarded as purely questions of remedy to be governed by the law of the forum . . ." The court states the above rule is supported by a long list of authorities. See also 15 C. J. S. 955, Par. 221; Beale, Conflict of Laws, Vol. 3, p. 1614, Sec. 597.1.

It is the established rule to which California is no exception that: While a judgment is *res adjudicata* and binding only between the parties and their privies, nevertheless there is an exception to the rule universally recognized, which sustains their admissibility in evidence and constitutes *prima facie* evidence for certain purposes against *third persons, who are neither parties nor privies thereto, even though it be only judgment in personam.* This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment and subsequently asserting a claim to the property affected by it, *as the foundation of, or as an introductory fact to, or as a link in his chain of title.* (*Chapman v. Moore* 151, Cal. 509 at 515-6 (91 Pac. 324).) [See Appendix pp. 1-3.]

See, also: *Title Insurance Co. v. U. S. F. & G. Co.* (8 Pac. (2d) 912), 121 Cal. App. 73 (76-77) [See Appendix pp. 3-4); *Scott v. Warden*, 111 Cal. App. 597, at 593-4 (296 Pac. 95); 15 *Cal. Jur.* 184; *Cal. Code Civil Procedure*, Sec. 1851; *Ellsworth v. Bradford*, 186 Cal. 316, at

325 (199 Pac. 335); *Barr v. Gratz's Executors,* 4 Wheaton 213, 4 Law. Ed. 533 (see annotation in respect to aforesaid rule following this case in 4 Law. Ed. at p. 852. This case is cited with quotations from it, in *Chapman v. Moore, supra*); *Mathews v. Hanson,* 124 N. W. 1116-1118, 19 N. D. 692; *Campbell v. McLaughlin,* 270 S. W. 257 (259-60) (Tex. Civ. App.); *Railroad Equipment Co. v. Blair,* 145 N. Y. 607, 39 N. E. 962; *W. T. Carter & Bros. v. Rohden,* 72 S. W. (2d) 620-625 (Tex. Civ. App.); *Fuller v Mohawk Fire Ins. Co.,* 245 N. W. 617 (618), 187 Minn. 447; *Harwick v. Hook,* 8 Ga. 354, at 358-9; *Baten v. Kirby Lumber Co.,* 103 Fed. (2d) 272, at 274; *Minn. Debenture Co. v. Johnson,* 102 N. W. 381-382, 94 Minn. 150; *Cameron v. Cuffee,* 144 S. W. 1024-1028 (Tex. Civ. App.); *Virginia etc. v. Charles,* 251 Fed. 83, at 115; *MacMillan v. Walker,* 93 Pac. 520, 48 Wash. 342; *Owens v. N. Y. etc. Co.,* 45 S. W. 601 (603) (Tex. Civ. App.); *Black on Judgments,* Vol. 2 (2d Ed.), p. 921, par. 607; 34 *C. J.* 1054.

In such an action the judgment which determines that one of the parties has a right or title superior to that of the other party, has the effect of an involuntary transfer from the unsuccessful party to the other. *Restatement of the Law, Judgments,* p. 524, par. 110; also p. 502, par. 104d; *Title Insurance Co. v. United States F. & G. Co., supra; Chapman v. Moore, supra; Scott v. Warden, supra,* and other cases cited *supra.*

This rule applies alike to questions of title to either real or personal property.

Ry. Equip. Co. v. Blair, supra (involving title to freight cars); *Hardwick v. Hook, supra,* involving title to a slave; *Perkins v. Benguet etc.,* 55 Cal. App. (2d) 720 (132 Pac. (2d) 70), involving ownership of stock and dividends, heretofore cited at length under argument on Specification 1, and in Appendix at pages 4-10.

It is now well established that a judgment determining that one of two claimants is the owner of a claim against a debtor is res adjudicata and conclusive against the debtor in a later action brought by the successful claimant to enforce payment of said claim, notwithstanding that the debtor was not a party to the former action between the claimants. Perkins v. Benguet, 55 Cal. App. (2d) 720. This case has been set out at length hereinbefore in our argument, under Point I. *Hughes v. United Pipe Line Co.,* 119 N. Y. 423, 23 N. E. 1042; *Commercial National Bank v. Allaway,* 207 Iowa 419, 223 N. W. 167.

Said findings in view of the rules hereinabove stated are contrary to the evidence in that the Decree determined that the Mayfilm Corp. was not the owner of the claim against Universal; that Joe May was the owner; that his assignment to the Bank was valid and that the latter succeeded to the ownership thereof as assignee of said May. The judgment roll supporting the Decree refers to the enjoining of Mayfilm Corp. from enforcing the judgment against Universal. The restraining order was granted upon Joe May's motion. [R. p. 210.] The court should have made its findings in accord with the Decree.

According to the rule announced in the foregoing cases the Decree was entitled to be given full evidentiary value. Had the trial court done so, the opinion evidence of the experts would not only have been inadmissible, but if admitted would have to be considered futile and ineffective to overcome the Decree. It is therefore conclusive as a matter of law that there is no evidence sufficient to support the findings complained of. Further, had the court given proper evidentiary value to the Decree it would have been compelled to find that Mayfilm Corp. was *not* the owner of the judgment and therefore could not lawfully enforce it.

B. Finding No. VI [R. pp. 37-8] is erroneous as it is not supported by the evidence and is contrary thereto.

This finding recites that the Appeal Court (Kammergericht) "found" that the claim against Universal had not been transferred to Joe May. The trial court concludes therefrom that the "Grounds of Decision" of the German court *was and is* a conclusive determination of that issue between Universal on one hand, and Mayfilm Corp. and its successors on the other.

Since the only evidence upon which said Finding VI can be based is the Kammergericht Judgment Roll in that portion designated as "Grounds for Decision" [R. pp. 128 *et seq.*] it is necessary to examine same carefully. It should be noted first that the German court recites that defendant therein (Universal) contended that Mayfilm Corp. was not *"entitled to sue"* [R. p. 128] for the reason that "besides other assets the claim sued upon" belonged to Joe May, although *by agreement* the suit *"was to be continued by the corporation."* [R. p. 129.] The court ruled that "Plaintiff (Mayfilm) *is entitled to sue upon the claim."* Appellants urge that the "grounds" are "merely *dicta,* could not be used against" the Bank "or Mr. May because they were NOT parties thereto, and because the factual conditions upon which "they are based" are not in existence, as was presented in the declaratory action. [R. p. 222.] The language used in the declaratory action states the situation so well that the same is hereby adopted.

> "The District Court of Appeal assumes that the agreements made with the defendant were those of a corporation liquidation, and that the corporation debts had to be paid first. As far as the first premise is concerned, the District Court of Appeal overlooks the fact that the Mayfilm Corporation was not in liquidation at the time when the agreement in question was made, to wit: in the year 1930. At the time when

the agreements between the stockholder, May and Aussenberg were made, and the directors of the corporation agreed that upon payment of 45,000 Marks a number of assets be assigned to the stockholder, May, the corporation was alive and nobody thought of its liquidation." . . .

"If the District Court of Appeal speaks of a distribution of the assets among stockholders, this is a mistake as to the actual facts. The distribution to stockholders takes place, if assets are turned over to stockholders, either without any consideration, or upon transfer of stock, *not however, if sales take place upon cash payments.*" . . . (Italics ours.)

"The further consideration of the District Court of Appeal that it required the payments of the debts of the corporation is based upon a wrong factual assumption, to wit: that there were debts. The debts of the defendant originated in the year 1932. In the year 1930, the defendant, whose business, as was mentioned before, was at a standstill, was a corporation which had nothing but assets."

It is quite evident that the Kammergericht "ground" were not *res adjudicata* as to May, as he was not a party thereto. Further, it must be seen that the question of "ownership" of the judgment was later passed upon in Germany, by a court of competent jurisdiction, and therefore that fact demonstrates that the "grounds" were not "*res adjudicata*" as to Joe May. (Declaratory relief action hereinbefore described.) In that action we again adopt language found in the judgment roll:

"Defendant wants to prove the lack of authority of Mr. May to the claim by the court files, Mayfilm Corporation versus Universal, particularly by the judgments rendered therein by the District Court of

> Appeal and the Supreme Court. In the conclusions of law of the Supreme Court Judgment, the question of the right of the then plaintiff, Mayfilm Corporation, to the claim was not mentioned at all, because the then defendant, Universal, did not question before the Supreme Court plaintiff's authority to sue."

Finally, the "effect" of said "grounds" according to German law was considered by the German court in the later declaratory action as it was specifically urged therein, and the answer offered by the plaintiff therein was:

> "The question is immaterial, however, because naturally, the conclusions of the judgment of the District Court of Appeal did not become final, and that the Superior Court, which is now trying this case anew, has to examine the question of the right to the claim." [R. p. 221.]

Further, in the "Grounds for Decision" in the declaratory action the court stated in referring to the ownership of the claim that "In spite of the fact that the lawsuit was continued under the old title, the claim belonged to Joe May" who bore the costs of the litigation to the Kammergericht and to the final revision in the Reichsgericht. [R. pp. 229-30.]

Appellants urge that the "grounds" of the Kammergericht judgment were first, mere *dicta* and are not to be *given the effect of a judgment* so as to bind anyone, much less Joe May; second, they were superseded by a Supreme Court decision on appeal; third, that they cover only the question of *proper party* and not the question of *ownership;* fourth, the question of *ownership* was determined when *that* issue was in question in a later action by a German court of competent jurisdiction; fifth, the Mayfilm Corp. if it ever had any rights to the claim against Uni-

versal, was, by subsequent events, legally and judicially divested of them, and a final determination made to the effect that Joe May, not Mayfilm Corp., was the owner of the claim and judgment.

We can thus see that the only evidence in the entire record on the force, effect and construction of the Kammergericht "grounds for decision" on the issue of *ownership* of the claim, is the later final Decree in the declaratory action. This not only is the *only* German law in evidence on the subject, *it is a statement of construction of the Kammergericht "grounds" according to German law, by a German court of unchallenged jurisdiction.* Therefore, any finding made by the trial court, such as Finding No. VI that deviates from or contradicts the construction and effect of the "grounds" as judicially and *finally adjudicated* in Germany, is not only contrary to the *only* evidence in the case, but is totally unsupported by any evidence whatsoever.

Appellants submit that the trial court was obliged to follow the construction of the "grounds" as decreed by the German court in the declaratory relief action. We submit that where a *German* court has placed a construction or interpretation upon a *German* judgment, that the same rule of law is applicable with respect thereto, to wit: that such construction must be followed by the courts of the forum, as is applicable to the case where a foreign statute has been construed by the courts of the jurisdiction of their enactment. In the latter instance it is well settled that in construing the statutes of a foreign state the construction placed thereon by the courts of the state of their enactment will be followed by the courts of the forum. *McGrew v. Mutual Life Insurance Co.*, 64 Pac. 103, 132 Cal. 85, 89; *McManus v. Red Salmon Canning Co.*, 173 Pac. 1112, 37 Cal. App. 133, 137; *Platnes v. Vincent*, 229 Pac. 24, 194 Cal. 436; *People v. Goddard*, 258 Pac.

447, 84 Cal. App. 382, 386; *Restatement — Conflict of Laws,* p. 737, par. 621c.

Assuming, however, that the trial court could place its own construction thereon, it would have been forced to the same conclusion as stated in the Decree, because under American law that portion of the "grounds" relied upon by appellee and the trial court as constituting *res adjudicata* does not constitute *res adjudicata* herein for the following reasons:

a. In the Kammergericht judgment the issue was "*proper party*" and in the case at bar the issue was *ownership.* In order that a judgment in one action may constitute an estoppel against a party thereto in a subsequent action, it must be made to appear that upon the face of the record or by extrinsic evidence, that the identical issues involved in the second action was determined in the first action. Unless the issues are identical, there can be no *res adjudicata. Hemet v. Oake Hement Water Co.,* 69 Pac. (2d) 849, 9 Cal. (2d) 136, at 142; *Beronio v. Ventura Co. Lumber Co.,* 61 Pac. 958, 129 Cal. 232 at 236; *Title Guarantee & Trust v. Munson,* 11 Cal. (2d) 621 at 630, 81 Pac. (2d) 944.

b. The Kammergericht "grounds" "assumed" *but did not decide* that the claim was not in reality "assigned" to Joe May. [R. p. 129.] The word "assigned" is quoted by the German court. That court also stated by way of argument that it is "supposed" that the Mayfilm Corp. was "authorized" to *continue* the litigation, by agreement. Actually that portion of the "grounds" purporting to deal with the ownership of the claim as distinguished from the question of proper party plaintiff, is based upon speculation and conjecture and was collateral to the main issue.

It is well settled that in view of the certainty required in estoppel, nothing must be left to argument or inference.

If upon the face of the record anything is left to conjecture, as to what was necessarily involved and decided, there is no estoppel on it when pleaded, and nothing conclusive in it when offered in evidence, and a judgment cannot be conclusive of any matters which came only collaterally in issue, nor of any matters incidentally cognizable. Although collateral evidentiary matters may be offered, controverted and denied, they are not concluded by the judgment. *People v. Bailey*, 158 Pac. 1036, 30 Cal. App. 581 at 589; *Title Guarantee and Trust Co. v. Munson*, 81 Pac. (2d) 944, 11 Cal. (2d) 621-632; *Blumenthal v. Maryland Casualty Co.*, 6 Pac. (2d) 965, 119 Cal. App. 563 at 566-567; *Lillis v. Emigrant Ditch Co.*, 30 Pac. 1108, 95 Cal. 553; *Co. of Sonora v. De Winton*, 287 Pac. 121, 105 Cal. App. 166 at 177; *Estate of Hoydenfeldt*, 59 Pac. 839, 127 Cal. 456 at 459; *Adler v. Smiley*, 104 Pac. 997, 11 Cal. App. 343 at 347. Further, the consideration by the Kammergericht as to the character of the title between Joe May and Mayfilm Corp. was entirely unnecessary for the disposition of the issue as to proper party plaintiff, and as a consequence, *any declaration as to the nature, extent or kind of title was without any binding force in respect thereto as between Mayfilm Corp. and Joe May, and without* any binding force as an adjudication either upon the parties, their privies or anybody else. *Fulton v. Hanlow*, 20 Cal. 450, at 483.

c. The Kammergericht "grounds" in so far as it purports to adjudicate the ownership between Joe May and Mayfilm Corp. cannot be considered *res adjudicata* herein, because in the Kammergericht action, Mayfilm Corp. and Joe May were not adverse parties therein, but on the contrary in that action, their interests coincided, *i. e.*, that judgment be recovered against Universal in the name of Mayfilm Corp. therein for the amount sued upon. Since Joe May not only was not a party thereto, but was not

an adverse party, as to Mayfilm Corp., the doctrine of *res adjudicata* could not apply as to the determination of any rights between Mayfilm Corp., and Joe May, as to the ownership of the claim. The rights between assignor and assignee, transferee and transferor as between themselves, cannot be determined in any action with a third person *unless both assignor and assignee are parties thereto and are adverse parties. Live Oak Cemetery Assn. v. Adamson,* 288 Pac. 29, 106 Cal. App. 783 at 787; *Tabour Realty Co. v. Nelson,* 184 N. W. 196, 44 S. D. 369; *West Texas Bank v. Rice,* 185 S. W. 1047 (Tex. Civ. App.); Section 1910, *Code of Civil Procedure; Blood v. Marcuse,* 38 Cal. 590, 595; *Restatement, Judgments,* p. 466, par. 93d 13.

As to any collateral agreement between Mayfilm Corp. and Joe May as to their relationship to each other and the rights between themselves, the defendant in the Kammergericht action was not concerned. *Knobolch v. Ass'd Oil Co.,* 152 Pac. 300, 170 Cal. 144; *Vance v. Gilbert,* 174 Pac. 42, 178 Cal. 574 at 577; *Hentig v. Johnson,* 107 Pac. 582, 12 Cal. App. 423 at 425; *Ralph v. Anderson,* 200 Pac. 940, 187 Cal. 45 at 48.

As Mayfilm Corp. was entitled to sue, it was the real party in interest, and it is immaterial to the defendant in the Kammergericht action whether Mayfilm Corp. did so as the trustee of Joe May, or otherwise. *Anson v. Townsend,* 15 Pac. 49, 73 Cal. 415 at 419.

d. Even if it should be deemed that Joe May was a party to the Kammergericht action, by reason of purchasing the claim *pendente lite,* such circumstances would only make Joe May a co-party or co-plaintiff, and under such circumstances, the rights between Mayfilm Corp. and Joe May as to their claims of ownership between themselves to the claim sued upon therein, could not be adjudicated nor would any purported adjudication in respect thereto

constitute *res adjudicata* because said parties were not adverse parties therein. Parties must be *adverse parties* in an action before any matter as between themselves can be deemed *res adjudicata*. *C. C. P.* 1910; *Robson v. Superior Court,* 154 Pac. 8, 171 Cal. 588-594-5; *Victor Oil Co. v. Drumm,* 193 Pac. 243, 184 Cal. 226-239; *Estate of Heydenfeld,* 59 Pac. 839, 127 Cal. 456 at 459; *Black on Judgments,* Vol. 2, par. 550, p. 906.

Where a party acquires an interest in the litigation *pendente lite,* his position in the litigation is analogous to a co-party to his assignor. *Black on Judgments,* Vol. 2, p. 906, par. 550; *Cray v. Word, 37* Barb. 377, 153 Ind. 5, 53 N. E. 94.

e. Even were it assumed for the sake of argument that the Kammergericht "grounds" constituted a form of adjudication as between Joe May and Mayfilm Corp. as to the actual ownership of the claim involved therein, still the declaratory Decree which adjudicated their actual ownership of the claim and judgment, and which was between the two claimants thereto, would prevail as to the determination of the rights of ownership as between Mayfilm Corp. and Joe May. It is a general rule that where the question has arisen as to the operation or the effect of two judgments, adjudications upon the same matters, which are inconsistent, then it is held that the second, or judgment later in point of time, prevails. Under such circumstances, the declaratory judgment must be deemed to determine the rights of ownership between Mayfilm Corp. and Joe May, since it was later in point of time. *Wood v. Pendelay,* 35 P. (2d) 526, 1 Cal. (2d) 435; *Calif. Bank v. Traeger,* 10 P. (2d) 51, 215 Cal. 346; 15 *Cal. Jur.*

104 and 105; *Semple v. Wright,* 32 Cal. 659; *Semple v. Ware,* 42 Cal. 619; *Perkins v. Benquet,* 55 Cal. App. (2d) 720 at 744 (132 Pac. (2d) 70).

f. But even were it to be conceded for argument's sake that the Kammergericht "grounds" constituted some form of *res adjudicata* as to said ownership such adjudication was effective as of the date of its entry, July 27, 1932. Any title to the claim acquired by Joe May thereafter would be admissible herein. Since the Decree adjudicated that issue and became effective as of February 25, 1935, the effect of such Decree is that as of February 25, 1935, Joe May was the owner, and even though prior thereto, Mayfilm Corp. might have been the owner thereof, the said Decree constituted in force and effect, the transfer of whatever interest Mayfilm Corp. may have had to Joe May. Facts occurring subsequent to or title acquired subsequent to a prior adjudication, defeats the claim of *res adjudicata* of a former judgment. *District Board v. Hilliker,* 98 Pac. (2d) 782, 37 Cal. App. (2d) 81 at 96; *Torne v. McKinley Bros.,* 56 Pac. (2d) 204, 5 Cal. (2d) 704 at 708-9; *Hurt v. Albet,* 3 Pac. (2d) 545, 214 Cal. 15 at 26; *Kirbe v. G. Graves,* 191 Pac. 81, 47 Cal. App. 575.

We therefore submit that said Finding No. VI, under German law or American law, finds no support in the evidence, is contrary thereto, and is contrary to law.

C. Finding No. VII [R. p. 38] is erroneous as it is not supported by the evidence and is contrary thereto.

This finding states that even if the Bank had the ownership of the claim and judgment, that under German law the transactions had between and among the Bank, Joe

May and Mandl did not have the effect of transferring the same to Mandl.

Appellants claimed that there was a transfer to Mandl by operation of law, and relied upon the German code sections. Appellants claimed a further transfer to Mandl by virtue of the notice sent by the Bank to Universal which acted as an equitable assignment, *and also claimed a transfer as the result of an actual assignment given by the Bank to Mandl.*

Appellees by expert opinion sought to show the code sections were not applicable, and claimed that the notice was not an assignment. Appellees at no time denied or controverted the appellants' evidence that there was an actual assignment given. Appellees conceded that the claim could be assigned orally or in writing and that the judgment followed the claim.

As to assignment by operation of law. The code sections cited in Specification 2E are pertinent. Sec. 774 [R. p. 250] provides that where a guarantor satisfies a creditor, the latter's claim is transferred to the former. Sec. 401 [R. p. 251] states that in such cases covered by Sec. 774 that with the claim so transferred, . . . that any security given is likewise transferred to the paying guarantor. Sec. 409 [R. p. 439] in effect states that notice of such assignment to the guarantor, when given to the debtor is valid against the creditor as towards the debtor, even though the assignment is not made or is ineffective. It has the effect of notice to the debtor of assignment, and *presentation thereof* by the assignee.

The uncontroverted evidence showed that Mayfilm Corp. was the debtor, that Joe May, as guarantor, assigned the judgment to the creditor, Bank; that Mandl was also a guarantor and paid the debt. Therefore Mandl by virtue of German law became the owner of the security, *i. e.*, the judgment against Universal. It was undisputed that the Bank, upon receiving payment, notified Universal in New York of the assignment to Mandl and thereby, by virtue of Sec. 409, protected Universal if it paid Mandl, and estopped itself from claiming payment from Universal.

Appellee contended the code sections did not apply because firstly, May had made an absolute assignment of the judgment to the Bank, and that therefore German law required an actual assignment to Mandl; that even if the judgment could be transferred by operation of law, it could be transferred only to a "surety" but not to a "warrantor." They did admit, however, that the Bank, in describing Mandl, referred to him as a "surety." The appellees' experts based their opinion upon the code sections and a distinguishable and inapplicable case. It is conceded that in Germany even Supreme Court cases annunciate the law of the particular case decided, and, unlike the law of America, cannot reconstrue or negate the code law, which latter is supreme. Appellants submit that expert opinion is pitifully ineffective to interpret code law contrary to the plain, unambiguous language contained therein.

Further, the uncontroverted evidence discloses that in Germany the law recognizes "commercial usage." [R. p. 498.] That thereunder the business transaction between a bank and its customer were interpreted differently than

transactions between other parties. That the dealings between bank and customer were informal: that the transfer of the securities were handled with as little formalities as possible. That thereunder the transaction between Mandl and the Bank was controlled thereby so that the security, upon the occurring of the "deserving condition," was transferred to Mandl without any act being done or required to be done. [R. p. 497.] That further, with respect to the transaction under which Mandl became a guarantor, the intention of the parties prevailed in interpreting their transactions; that German law required "that all contracts shall be interpreted according to the requirements of good faith, ordinary usage and business usage being taken into consideration." [R. p. 443.] Therefore, under German Code law the judgment was transferred to Mandl by operation of law. Under Specification 2E we have discussed and distinguished the case used by appellee as the basis of their experts' opinion. We submit that in the light of said discussion and the German law of *custom and business usage* the case must be disregarded and considered inapplicable to Bank transactions.

Also, under German law, Section 409 [R. p. 439], since the Bank notified Universal of the transfer to Mandl, the legal effect of said notice was to transfer the claim, by operation of Section 409, to Mandl, "even though the assignment had not been made, or is not effective." "It is equivalent to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter presents it to the debtor." This notice could not be withdrawn except with the new creditor's consent.

The effect of said German Code section was to *validate* assignments which otherwise were incomplete or ineffectual because of certain deficiencies.

We submit that under German law there was an assignment to Mandl by operation of law.

Even if it were to be held that there was not an assignment by operation of law, Finding VII must fall because the undisputed, unchallenged and uncontroverted evidence discloses that *there was in fact an actual written assignment of the judgment against Universal executed by the Bank and delivered to Mandl.* Portions of Mandl's testimony taken from his deposition are herein set out. [Pl. Ex. 9, R. pp. 261-70.]

> "Q. Have you any documents here which pertain to your negotiations with the bank for such guarantee? . . . A. No." [R. pp. 261-2.]
>
> . . . . . .
>
> "Q. Were any documents or letters exchanged between you and the bank pertaining to your taking over this guarantee? A. Yes.
>
> Q. Where are such documents or letters at the present time? A. They may be in Vienna, I don't know. . . .
>
> . . . . . .
>
> Q. Do you think those documents are in Vienna at the present time? A. Yes." . . . [R. p. 262.]
>
> . . . . . .
>
> Q. Do you recall in what form payment was made by you to the bank on the said guarantee? A. Yes.
>
> Q. In what form was payment made? A. To the debit of my French franc account with the Bank for Foreign Commerce at Berlin.

Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.? . . . "A. Yes." . . . [R. pp. 263-4.] . . .

. . . . . .

"Q. This assignment which you made to the Union Bank & Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct? . . . A. Yes, the same thing.

Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?" [R. p. 269.] . . . "A. Yes." [R. p. 270.]

Appellants submit that the foregoing must be accepted as conclusively showing an actual assignment. It was never impeached, contradicted or denied by appellees. *It was the only evidence on the question of an actual assignment,* and the court should have found upon that issue in accordance therewith.

Further, said Finding VII is contrary to the evidence for it failed to give any effect to the notice of transfer sent by the Bank to Universal. [R. pp. 245, 295.]

Although the effect of this notice under German law was disputed by the experts, there is no doubt that under American law said notice is a valid assignment in that the Bank *directed* Universal *to pay* Mandl, and that the judgment could be satisfied *only* by payment to him. Said

notice was directed to Universal at *New York, U. S. A.*, and thereby fixed the place of performance at the debtor's residence. The notice further shows that Mandl was a non-resident of Germany, to wit: Austria. (Before the "anschluss.")

This document was *more than a mere notice.* It contained a recital of the transactions had, recited that the claim against Universal has been transferred to Mandl and *directed Universal to pay Mandl, and stated that said debt could be satisfied only by paying Mandl.*

This, under American law, constituted an *"equitable" assignment and transferred the legal title to said judgment to Mandl.* The American law must be applied in interpreting the legal effect of said notice for the following reasons:

Either the law of the forum applied, to wit: California, or the law of the place where the debtor resided, where it received the notice, where its obligation to pay Mandl became fixed, and where demand for payment was made, to wit, New York.

In either case the law is the same. In both places the "notice" of and by itself is an "equitable" assignment and constituted Mandl the legal owner of the judgment.

The question of whether the "notice" conferred upon Mandl the ownership of the judgment so as to permit him or his successors, as such owner to prosecute an action against Universal *must be determined by the law of the forum.* As stated in *Jos. Dixon Crucible Co. v. Paul,* 167 Fed. 784, 786 (C. C. A. 5):

> "When suit is brought by an assignee of a chose in action, the question as to whether the assignment

> conferred on him such a right as he asserts *must be determined by the law of the forum.* (Italics ours.) The suit at bar being brought by an assignee in a United States Court of law in Florida, the question raised by the defendant whether or not the assignment vests such title in him as to authorized the suit as brought, and to entitle him to judgment in that Court must be determined by the laws of Florida.'

To same effect: *Pritchard v. Norton,* 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; *Beale-Conflicts of Laws,* Vol. 3, p. 1603, par. 588.1; *Williston on Contracts,* Rev. Ed., Vol. 2, p. 1296, par. 446; *Restatement, Conflict of Laws,* p. 705, par. 388.

6 C. J. S., "Assignments," p. 1138, par. 82, states:

> "It has been held that the effect of an assignment is to be determined by the law of the forum, or the place where rights claimed under the assignment are sought to be asserted."

The *legal effect* of the "notice," therefore, is governed by the laws of California where suit was brought. (Universal maintained a place of business in California.) Under California law, it is well settled that in order to constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title. The order, direction, or request of a creditor to his debtor that the latter shall pay money due the former to a third party constitutes an equitable assignment, and vest in the third party the ownership of the funds, and the right to prosecute the action against the debtor for the recovery thereof. *Puterbaugh v. McCray,* 144 Pac. 149, 25 Cal. App. 469,

471; *Title Insurance v. Williamson,* 123 Pac. 245, 18 Cal. App. 324; *Brady v. Rauch,* 94 Pac. 85, 7 Cal. App. 182; *Gomez v. Warren,* 91 P. (2d) 214, 33 Cal. App. (2d) 313; *McIntyre v. Hauser,* 63 Pac. 69, 131 Cal. 11; *Cutner v. Lyndon,* 60 Pac. 462, 128 Cal. 35; *Chapman v. Cannon,* 75 P. (2d) 522, 24 Cal. App. (2d) 448; *Oxnard v. Penn,* 23 Pac. (2d) 823, 132 Cal. App. 763; *Tornquist v. Johnson,* 13 Pac. (2d) 405, 124 Cal. App. 634 (equitable assignment of judgment). The "notice" under California law clearly was an equitable assignment, but if the law of California be not applicable, then most certainly the law of New York must be applied, for that is where Universal received the notice, and the obligations of the debtor became fixed as to Mandl. *Dow v. Gould and Curry S. M. Co.,* 31 Cal. 629, 652; and that is where performance (payment) of the judgment under said "notice" was contemplated. The notice, therefore, was to be interpreted according to the law of the place of performance. (*C. C.* 1646.) Where an assignment is made in one place and to be performed in another, the law of the place of performance will control in determining the validity of the assignment, or whether an assignment exists. *Goodchild,* 290 N. Y. S. 683, 160 Misc. 738; *Thompson v. Erie Ry.,* 131 N. Y. S. 627, 147 App. Div. 8; *A. B. T. v. Ann. Trust etc. Bank,* 159 Ill. 467, 42 N. E. 856; *National Bank of America v. Ind. Banking Co.,* 114 Ill. 483, 2 N. E. 407; *N. W. Mutual Life Insurance Co. v. Adams,* 155 Wis. 335, 144 N. W. 1108.

Under the law of New York the order, direction, or request of the creditor to his debtor that the *latter shall pay the debt due the former to a third person* constitutes

an equitable assignment of the funds, and vests in the third person the ownership and the right to prosecute the action against the debtor for the recovery thereof. *Hinkle Iron Co. v. Cohn*, 128 N. E. 113, 229 N. Y. 179; *Spencer v. Standard Chemical Co.*, 237 N. Y. 479, 480, 143 N. E. 651; *People ex rel. Martin etc. Co. v. Westchester County*, 57 App. Div. 135, 67 N. Y. S. 981; *Brill v. Tuttle*, 79 App. Div. 550, 81 N. Y. 454; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270; *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039; *Wright and Oden Co. v. Shayer*, 165 N. Y. S. 569; *Clearly v. Fogg*, 280 N. Y. S., 244 App. Div. 632; *Kalb v. Leff*, 18 App. Div. 447, 246 N. Y. S. 158; *Maynes v. Ludino*, 278 N. Y. S. 355, 154 Misc. 519.

The "notice," therefore, under New York law clearly constituted an "equitable" assignment and was sufficient to transfer the ownership of the judgment to Mandl. The mere fact that Mandl was not the plaintiff in this action is immaterial for as stated in 6 C. J. S. "Assignments," p. 1121, par. 69:

> "In an equitable assignment it appears to be immaterial whether the suit is between the assignee and the obligee of the chose, or between the assignee and the assignor, or those claiming under them."

The evidence clearly showed that there was an equitable assignment, and the court should have so found.

The evidence herein also showed that Mandl considered that he had a valid assignment from the Bank, and the Bank so considered it. The court therefore should have *found* that there was in fact an assignment.

Where both assignor and assignee admit and concede that an assignment has been made, *the debtor cannot question the validity thereof, or the effectiveness thereof. Dorner v. Heffner,* 58 Pac. (2d) 1308, 15 Cal. App. (2d) 97, 101; *Van Dyke v. Gardner,* 22 Misc. 113, 49 N. Y. S. 328; *Cornish v Marty,* 76 Minn. 493, 79 N. W. 507.

Neither could the appellee herein object to the validity of the assignment because of its contention that possibly alleged creditors might have objected to the same. *Blackford v. Westchester Fire Insurance Co.,* 101 Fed. 90.

In order to create a valid assignment it is not necessary that the debtor acknowledge the validity thereof, but where the debtor has received notice from the assignor that an assignment has been made, debtor cannot decline to acknowledge the validity thereof unless notified of the invalidity thereof by the assignor. *Goodman v. Zitserman,* 47 R. I. 466, 134 Atl. 34; *St. John v. Charles,* 105 Mass. 262.

The evidence proves an assignment from the Bank to Mandl and the court should have so found.

From the foregoing analysis it clearly appears the necessary and material findings herein not only are unsupported by the evidence, but in fact are contrary thereto. The findings objected to therefore cannot be sustained, without which the judgment herein must be reversed.

III.

Portions of Findings IV, V and All of VII Are Not Sufficient Either in Form or Content to Legally Constitute True Findings of Fact, and Are in Realty Mere Naked Conclusions of Law, Leaving It Doubtful What Particular Facts Therein Referred to Were Established. (Specification 3.)

The findings objected to are those portions of IV as set out under Specifications 2D, all of Finding V [R. p. 37], and all of Finding No. VII. [R. p. 38.]

It is well established that a purported general finding which is in effect but a conclusion of law is insufficient. 24 *Cal. Jur.* 974, note 13; *Hammond Lumber Co. v. Barth Inv. Co.*, 262 Pac. 31, 202 Cal. 606, at 609. A finding is also insufficient to support a judgment thereon where the finding, as such, merely states a general conclusion and leaves it doubtful what particular facts are established. 24 *Cal. Jur.* 964, note 16.

A. The statements in Finding IV to the effect that the Decree was not evidence against defendants herein, that it was not conclusive or binding on them or had no effect upon their rights, are all naked conclusions.

In *Wayte v. Patee*, 269 Pac. 660, 205 Cal. 46, at 53, a finding that a certain agreement "was a mere personal covenant and was not binding upon the assigns . . . nor the defendants" was held to be a mere conclusion of law, and as such was entirely ignored as a finding. The judgment based thereon was reversed.

The further statement in Finding IV that the decree was "not evidence against defendants" is a question of

law and not a question of *fact*. It has no proper place in findings of fact.

Said portion of Finding IV is further erroneous in that it applies the law of Germany, instead of the American law, in determining the evidentiary value and effect of the final declaratory decree.

We have heretofore shown by applicable authorities that the question of what is or is not evidence in an action is determined by the law of the forum. That law is clearly decisive on this question and the rule is that the said Decree is evidence for appellants and against the appellee. These authorities have been cited under point II of our argument.

B. Finding No. V in stating that Joe May did not acquire or succeed in the ownership of the Judgment, again merely states a conclusion of law purporting to state the *legal effect* of various transactions. Further, said "Finding" in the last sentence thereof states that certain facts upon which succession is claimed fail to transfer the judgment, but nowhere in said or any findings is there any definite reference to these facts, nor any description thereof, nor any finding as to their existence. Therefore said "finding" is too indefinite to be of any avail herein. The first portion refers to "transactions," the second part refers to "facts as a result of which" certain claims are made, yet neither portion definitely refers to either what those "transactions" or "facts" were, nor describes them, nor their existence. Therefore, and further, said "finding" is too indefinite to be of any avail.

It is well established that where a finding states that certain "facts" do not exist, or do not establish a given result, that such finding is defective in that it is not a finding of an ultimate fact, is a mere conclusion and leaves to inference or surmise what particular facts were established by the evidence, and for failure to find upon the issue of fact presented by the evidence the judgment must be reversed.

A finding that "the acts of the defendants alleged in the complaint did not inflict . . . grievous bodily injury . . ." is defective. *Franklin v. Franklin,* 74 Pac. 155, 140 Cal. 607, at 608. A finding that "all the material facts set forth in the complaint are true" is defective. *Ladd v. Tully,* 51 Cal. 277, at 278. A finding that "repeated acts of cruelty as established by the evidence" is defective. *Smith v. Smith,* 62 Cal. 466, at 468. To same effect, *Nelson v. Nelson,* 123 Pac. 1099, 18 Cal. App. 602.

In a mortgage foreclosure case the findings stated that the court did not find any balance due after deducting certain credits. This finding was held to be manifestly defective. (*Polhemus v. Carpenter, et al.,* 42 Cal. 375.) The court in that case (at 387-8) held: "The findings are so manifestly defective as to not require comment. Instead of stating facts involved in the issues, they contain only general conclusions drawn from the facts. They afford no information whatever as to the particular facts which the court considered established in the cause. The defendant was entitled to have more specific findings on facts within the issues, and on this ground the judgment should be reversed and a new trial awarded."

In all the above cases cited the courts held that such findings were too vague and indefinite, constituted mere conclusions, failed to find any particular facts, were clearly defective and insufficient and accordingly reversed the judgments.

Viewing Finding V in the light of the foregoing cases, it is clearly defective, in that it refers to undefined and undescribed facts as being insufficient to cause a result. The facts are not stated and are left to surmise. It cannot be ascertained from Finding V what facts were considered by the court as having been established, or what necessary facts were not found to have been established. It is similar to the cases cited *supra* in that it states that "the facts, as the result of which said acquisition or succession is *claimed to have resulted,* were and are insufficient . . ." Does this word "claimed" refer to the facts as claimed in the complaint? Does it refer to the facts *claimed* in the evidence? Appellees do not know and under the cases is entitled to know. It does not matter whether the facts the court so vaguely refers to, are those in the complaint or those in the evidence. Under the above authorities the finding is clearly insufficient, to support the judgment.

C. Finding No. VII is also subject to the same vice. It refers to "none of the transactions" and fails to define them or show what they were. It *concludes* therefore that such transactions did not have "the effect of transferring . . . the judgment . . .," and fails to state what the transactions were. This finding also recites that "the facts as *the result of which it is claimed* Fritz Mandl did acquire . . . said judgment . . . did not have the

effect under the law of the German Reich of tranferring . . . to . . . Mandl any part of the . . . title . . . of the Bank . . . in the . . . judgment." The finding fails to state what the "facts" referred to were. Again the court leaves it to conjecture and surmise what "facts" it refers to. It cannot be ascertained what "transactions" or what "facts" the court considered as having been established or not established; whether Mandl failed to acquire the judgment because certain "transactions" or "facts" were not established or whether the "transactions" were established and the legal effect was found to be insufficient or whether appellants failed to establish certain "facts" or whether the facts were established but were insufficient as a legal conclusion.

D. Before concluding our argument on this point, we wish to call the court's attention to the fact that Finding V directly contradicts the first sentence of Finding IV. The latter states that a German court of record rendered a declaratory judgment to the effect that the claim (judgment) was the personal property of Joe May, and not of Mayfilm Corp. and that *therefore* the assignment of said claim to the Bank by Joe May *was valid.* This refers to the final Decree that stated the correct German law on the point and the trial court's finding thereon was correct.

But, notwithstanding the above finding of fact, the trial court, in Finding No. V, contradicts itself by stating that *according to German law* Joe May *did not* acquire or succeed to the ownership of the claim. The two statements are not reconciliable, for on the one hand we have

an actual adjudication that the judgment was "the personal property of Joe May" and on the other hand that Joe May was not the owner thereof.

E. Further, Finding III also contradicts Finding IV for in the latter the court finds *that under German law* there was an adjudication that Joe May and *not Mayfilm Corp.* was the owner of the judgment, and in Finding III the court finds that under German law the said "claim and judgment" *"were and at all times since have remained the property of Mayfilm Corp."* These two findings likewise are contradictory of each other and irreconcilable.

Where findings upon an essential fact are opposed to each other the findings cannot support the judgment. *Moody v. Newmark,* 53 Pac. 944, 121 Cal. 446. They should be consistent. *Peak v. Republic Truck, etc.,* 230 Pac. 948, 194 Cal. 782; 24 *Cal. Jur.* 965-6.

The findings objected to are basic in that if any or all are found to be insufficient or defective, or contrary to each other the judgment based thereon cannot be sustained.

IV.

The Conclusions of Law Are Erroneous. (Specification 4.)

Conclusion of Law No. 1 [R. p. 39], to the effect that "Neither plaintiff or any of their predecessors in interest (other than Mayfilm A. G.) had or have any right, title or interest in or to the judgment sued upon, or in and to any part of the claim upon which said judgment was based," and Conclusion of Law No. 2 [R. p. 39] to the effect that "plaintiffs are not entitled to enforce said judgment" and Conclusion of Law No. 3 [R. p. 39], to the effect that "defendant is entitled to judgment, that plaintiffs take nothing and that defendant recover its costs" are, and each of them is clearly erroneous in that the same are (a) contrary to the evidence; (b) not supported by the evidence; and (c) contrary to law.

A. The evidence hereinbefore set forth, under Specification No. 2 shows that Mayfilm A. G. no longer was or is the owner of the judgment sued upon, or the claim upon which it is based; that the same was transferred from Mayfilm to Joe May firstly by purchase and assignment, and most certainly by the declaratory decree; that the same was assigned by May to the Bank and by the Bank to Mandl, and by Mandl to the Union Bank and by the Union Bank to the plaintiffs.

This has been fully discussed and analyzed under our argument on point No. II.

B. Said conclusions are and each of them is contrary to law in that they, and each of them, erroneously fail

and refuse to give any legal effect to the declaratory decree as *evidence* in this case; erroneously fail and refuse to give any legal effect to the actual assignment from the Bank to Mandl; erroneously fail and refuse to give any legal effect to the "notice" from the Bank to Universal as an equitable assignment under American law, or any effect under German law; erroneously interprets the German Code Law; fails and refuses to give any legal effect to the assignment from Mandl to the Union Bank or from the Union Bank to the plaintiffs; and lastly under the *evidence* in this case, and the law, the plaintiffs are entitled to judgment against defendant.

The law in respect to the foregoing, together with the applicable authorities have been fully set out in our argument under point No. II.

V.

The Judgment Herein Is Contrary to and Not Supported by the Evidence. (Specification 5.)

Since the grounds hereunder are the same as those set out under Specification No. 2 to show the several findings are contrary to and not supported by the evidence, in the interest of saving space, reference is hereby made thereto, and incorporated hereinunder.

The argument hereunder is the same as set out under point II, to which reference is respectfully made in the interest of saving space.

VI.

The Judgment Herein Is Contrary to Law. (Specification 6.)

The court: (a) erroneously held that the Decree constituted no evidence for appellants against these appellees. (Said Decree, by law, was *prima facie* evidence of muniment or link in the chain of or foundation of title and in the absence of evidence to the contrary (of which there was none), is conclusive on the defendant on the question of ownership as between the parties who litigated that question.) Furthermore, since appellee asserted that Mayfilm Corp. and not Joe May or his assigns was the owner of the judgment, and did not claim ownership in itself, the adjudication of the German Court in the declaratory Decree, determining that Joe May and not said Mayfilm Corp. was the owner thereof, and that his assignment to the Bank was valid, was and is binding and conclusive upon the appellee on the question of such ownership of the judgment sued upon;

(b) erroneously fails to hold that there was an actual assignment from the Bank to Mandl, or that there was an assignment by operation of law;

(c) erroneously held that the Kammergericht judgment was *res adjudicata* against appellants upon the question of ownership of the judgment sued upon;

(d) erroneously held that neither the appellants nor any of their predecessors in interest, other than Mayfilm Corp. have or had any title or interest in and to the judgment sued upon, or in or to the claim upon which it is based;

(e) erroneously failed to render judgment in appellants' favor for $24,337.76.

The argument, including the law affecting each of the foregoing have been set out under point II. Reference is hereby made thereto.

VII.

The Court Erred in Restricting the Determination of Mandl's Rights With Respect to the Assignment From the Bank to Mandl to That Alleged in the Pleadings, To-wit: That of "Operation of Law" Only, and Further in Holding That the Measure of Said Rights Was Determined by the "Notice" From the Bank to Universal. (Specification 7.)

A. With respect to the pleadings: The court construed the pleadings to mean Mandl asserted his rights to the judgment by virtue of an assignment by operation of law *only* and restricted Mandl's rights accordingly. [R. p. 52.]

There was introduced by appellants proof of an actual assignment by the Bank to Mandl. [R. pp. 261-70.] No evidence to refute the actual assignment was offered by appellee. Appellants further urged that the notice from Bank to Universal was an equitable assignment which under American law transferred the claim and judgment to Mandl.

The court erred, in considering Mandl's rights, by failing or refusing to find on issues of equitable or actual assignment as shown by the evidence on the ground that such issues were not raised by the pleadings.

The amended complaint discloses that in paragraph V thereof [R. p. 7], "That notice of the payment of the obligation of said Joe May *together with the assignment from said Bank for Foreign Commerce of said judgment to said Fritz Mandl* was given to the defendant in a letter dated February 25, 1936, and mailed to the defendant, Universal Pictures Corporation, on said date by said Bank for Foreign Commerce." (Italics ours.)

Appellants submit that this allegation of the complaint was sufficient to raise the issue of either equitable or actual assignment.

But assuming that the court's interpretation of the pleading is correct, the court still erred in view of Rule 15B of the Federal Rules of Civil Procedure. In part it states, ". . . when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings." The rule provides further that amendments to pleadings to conform to proof should be allowed, even after judgment and that failure to so amend "does not affect the results of the trial of these issues."

This rule is referred to by the commentators as creating an "automatic amendment" to the pleadings. In *Atwater v. N. A. Coal Corp.*, 111 Fed. (2d) 125, the court held, per Clark, J., that, "after trial judgment must be given according to the rights of the case whether the correct legal theory has been presented or not." To same effect are *Lintz v. Wheeler*, 113 Fed. (2d) 767 (C. C. A. 8); *United Clay Prod. v. Lender*, 119 Fed. (2d) 456; *Nesler v. Western Union*, 25 Fed. Supp. 478. Issues raised by the evidence and brought forward by the parties during the trial which are material to the issues involved must be considered by the court and *findings made thereon*. *Weiner v. Luscombe*, 66 Pac. (2d) 151, 19 Cal. App. (2d) 668, at 670; *Sun Maid, etc. v. Papazian*, 240 Pac. 47, 74 Cal. App. 231, at 238; *Wolf v. Gall*, 176 Cal. 787, 169 Pac. 1017.

When an issue involves an assignment, the pleadings relating thereto must be liberally construed with a view of

substantial justice between the parties. *Estate of Wickersham,* 96 Pac. 311, 153 Cal. 603; *McCaughey v. Shutte,* 46 Pac. 665, 117 Cal. 223.

B. Further, in construing Mandl's rights the court erred in limiting the same to the Bank's letter or notice to Universal. [R. pp. 32-3.] The court apparently regarding the notice in the light of a contract between Bank and Universal and therefore held parole evidence inadmissible to show the true transaction. The apparent ground of the court's ruling was that such parole testimony would nullify or change or vary the terms of the written notice. [R. pp. 402-3.]

First, considering this notice purely as such. It then was not such a document or contract as would come within the parole evidence rule. It was then merely a notice of an assignment, and not the assignment itself. Therefore it was susceptible of explanation by extrinsic circumstances or facts. The real transaction could be shown. This rule is stated in *First Federal Trust Co. v. Stockfleth,* 98 Cal. App. 21, at 24-5, (276 Pac. 371) thus: "Any writing which, neither by contract, operation of law, nor otherwise, vests, or passes, or extinguishes any right, but is used as *evidence of a fact,* and *not as evidence of a contract* may be susceptible of explanation by extrinsic circumstances or facts." (Italics ours.)

The same rule is stated in 31 C. J. S. "Evidence," page 851, paragraph 928; also in 22 C. J., page 1142, paragraph 1529. In *Porter v. Wormser,* 94 N. Y. 431, it was held that notices of sale sent by brokers to their principal are not writings of such a character as to preclude the admission of parole evidence to show the real transaction.

At pages 447-8 the Court of Appeals states, "It is insisted that those notices which the counsel characterize as 'purchase notes,' conclusively determine the point that the defendants were the purchasers of the bonds, and that parole evidence was inadmissible to show that they sustained any other relation to the transaction, or that in fact the bonds were sold to third persons. *We think the defendants were not precluded from showing the real transaction, and that the rules that parole evidence is inadmissible to change or vary written contracts have no application.*" (Italics ours.)

The *Porter v. Wormser* case, *supra,* and the case at bar have certain points of similarity. Wherein in the cited case the court held the notice was *not* such a contract as to come within the parole evidence rule, and did permit the real transaction to be shown, in the case at bar, the trial court held just the opposite and held the notice did come within the rule and therefore the true transaction could *not* be shown, to-wit: that the assignment from May to the Bank *therein set forth* was by way of security because the *assignment itself* did not show that fact. (The letter reciting the assignment did state that the assignment was "as security.") In the case at bar the evidence unquestionably shows that May's assignment to the Bank, though absolute on its face, was in fact, simply by way of security. It was admitted by appellee's witnesses as well as by those of appellants, that under German law a document which on its face was an absolute assignment, could be shown to be one given as security only. [R. pp. 401, 496-7, 411, 491.] This obviously could be shown by the law of the forum. *Shattuck and Desmond, etc.*

Co. v. Gillelen, 154 Cal. 778, at 784 (99 Pac. 348); *Golden v. Fisher,* 27 Cal. App. 271, at 280-81 (149 Pac. 797); *Renton-Holmes and Co. v. Monnier,* 77 Cal. 449, at 456-7 (19 Pac. 820).

The court, nevertheless, because of its strict adherence to the parole evidence rule, erroneously refused to give effect to or permit such testimony, and as a result found that no transfer by operation of law occurred. Had it done so, a different result would have obtained.

C. Appellants maintain, however, that the notice, by reason of its wording, must be construed as an assignment. The letter of notice sent by the Bank to Universal at New York on February 25, 1936, stated that the claim and judgment sued upon "has been transferred to . . . Mandl . . . of which fact we are notifying you herewith. You can satisfy this debt only by payment to the above named (Mandl)." [R. pp. 295-6.]

This notice admittedly received by Universal is in and of itself an actual equitable assignment, and had the effect of transferring as of its date, legal title of the claim and judgment to Mandl, irrespective of its additional recitations referring to an assignment by operation of law. Even in Germany this is recognized by the supreme code law, which states in section 409 thereof, that, "If the creditor inform the debtor that he has assigned the claim, the notice of assignment is valid against him as toward the debtor even though the assignment had not been made, or is not effective. It is equivalent to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter pre-

sents it to the debtor . . ." [R. p. 439.] Where such notice is given by the *former* creditor it is not necessary for the new creditor to exhibit the assignment to the debtor and the latter must perform in favor of the assignee. [Sec. 410, German Civil Code, R. p. 440.]

In Germany, the Bank by its notice to Universal estopped itself from ever asserting the right to receive payment on the judgment. [R. p. 349.] Mayfilm Corp. is estopped to claim payment by virtue of the declaratory Decree. Joe May admitted he had assigned the claim to the Bank, so he is also estopped to claim payment. [R. p. 482.] This leaves only the appellants who are Mandl's successors in interest.

Heretofore under our argument on Point II we have set out the law to the effect that the question of whether the "notice" conferred upon Mandl the ownership of the judgment, so as to permit him or his successors as such owner to prosecute the action against Universal, must be determined by the law of the forum. We have also therein shown that under the law of the forum, to-wit: California, it is well settled that in order to constitute an equitable assignment no particular words are necessary, if, from the entire transaction it clearly appears that it is the intention of the parties to pass title. Any order, direction or request of a creditor to his debtor that the latter shall pay money due the former to a third person constitutes an equitable assignment and vests the ownership of the fund in the third person together with the right to prosecute the action for the recovery thereof. (Citations already set out in Argument under Point II.)

The "notice" clearly contained all the requisites necessary to establish it as an equitable assignment under California law. But, if it were to be held California law is inapplicable, then as the only alternative, New York law must be applied, for it was there the notice was directed by the Bank, and it was there admittedly received by Universal. New York was the domicile of the debtor: that is where the obligation to pay Mandl became fixed, and that is where payment (performance) of the judgment was contemplated under said notice. The "notice" may therefore be interpreted according to the law of the place of performance, to-wit: New York. (Calif. Civil Code, Sec. 1646.) Where an assignment is made in one place and to be performed in another, the law of the place of performance will control in determining the validity of the assignment, or whether an assignment exists. *App. of Goodchild,* 290 N. Y. S. 683; 160 Misc. 738; *Thompson v. Erie Rlwy.* 131 N. Y. S. 627 147 App. Div. 8; *A. B. T. v. Ann. Trust, etc. Bank,* 159 Ill. 467, 42 N. E. 856; *National Bank of America v. Ind. Banking Co.,* 114 Ill. 483, 2 N. E. 407; *N. W. Mutual Life Insurance Co. v. Adams,* 155 Wis. 335, 144 N. W. 1108. In the last cited case an assignment of insurance proceeds was made in Minnesota to be paid in Wisconsin. In Minnesota the assignment was void, but in Wisconsin it was valid. The place of payment or performance determined the applicable law and therefore the assignment was held to be good.

Under the law of New York the order, direction, or request of the creditor to his debtor that the latter shall pay the debt due the former to a third person constitutes an equitable assignment of the funds, and vest in the third person the ownership and the right to prosecute

the action against the debtor for the recovery thereof. The authorities in support of this rule have heretofore been cited under Argument, Point II.

The "notice" therefore under New York law clearly constituted an equitable assignment, which was sufficient to transfer the judgment sued upon to Mandl.

D. In addition to the foregoing reasons why the court should have found an actual or equitable assignment, we submit that where the assignor and the assignee each unequivocably recognize, admit and act on the premise that an assignment has been made, and each are satisfied with its validity, the debtor cannot question the validity thereof, or challenge its effectiveness as such assignment. *Dorner v. Heffner*, 15 Cal. App. (2d) 97, 101, 58 Pac. (2d) 1308; *Van Dyke v. Gardner*, 49 N. Y. S. 328, 22 Misc. 113; *Cornish v. Marty*, 76 Minn. 493, 79 N. W. 507.

Even where alleged creditors of the assignor would be allowed to challenge the assignment, this right is not allowed to the debtor. *Blackford v. Westchester Fire Ins. Co.*, 101 Fed. 90.

In conclusion, appellants submit there were three distinct assignments. First, the assignment by operation of law; second, an equitable assignment as set forth in the "notice" which under German law, California law or New York law was sufficient to transfer the judgment to Mandl; and third, *the actual assignment* as described by Mandl in his deposition, which has never been contradicted, refuted or denied. Therefore the court erred in restricting Mandl's rights to either the pleadings or the "notice" and should have made findings on the equitable and the actual assignments. Such findings if made should have determined that there was an assignment of the claim to Mandl and that he was entitled to sue thereon, and therefore the failure to make findings on such issues were prejudicial to appellants.

VIII.

The Court Erred in Denying Appellants' Motion for a New Trial. (Specification 8)

The court should have granted appellants' motion for a new trial on the following grounds:

(a) The judgment is contrary to the evidence. This has been fully presented in our argument under Point II to which reference is hereby made.

(b) The judgment is unsupported by the evidence. This likewise has already been argued under Point II to which reference is hereby made.

(c) The judgment is contrary to law. This has been set forth in Argument under Points II, VI and VII to which we respectfully refer.

(d) Errors of law occurring at the trial.

(1) The court erred in admitting opinions of experts in answer to *hypothetical* questions, for the purpose of showing that an *actual* German Declaratory Decree was *erroneous* according to German law. Said Decree determined Joe May to be the owner of the judgment sued upon. (Presented under Point I.)

(2) The court erred in restricting the determination of Mandl's rights with respect to the assignment from the Bank to Mandl to that alleged in the pleadings, to-wit: that of "operation of law" only. (Presented under Point VII.)

(3) The court erred in applying the "parole evidence rule" to the "notice" from Bank to Universal and in construing Mandl's rights under said "notice" by said rule. (Presented under Point VII.)

(4) The court erred in failing to give any evidentiary value to the Declaratory Decree. (Presented under Point II A.)

(5) The court erred in ruling on the issue of ownership of the judgment sued upon, that the Kammergericht "grounds of decision" were first a judgment, and secondly that they were *res adjudicata* against Joe May and his by operation of law, or by an equitable assignment or by an actual assignment. (Argued under Point VII.)

(6) The court erred in holding that there was no assignment of the judgment by the Bank to Mandl, either by operation of law, or by an equitable assignment or by an actual assignment. (Argued under Point VII.)

(7) The court erred in making findings of fact in the form of naked conclusions of law, or in such an indefinite manner as to leave in doubt what facts he did or did not find to exist. (Presented under Point III.)

(8) The court erred in making findings of fact that conflict with each other. (Presented under Point III.)

Each of the foregoing points has been argued at length heretofore, and it would be repetitious to reargue them here.

(e) Newly discovered evidence.

In support of the motion for new trial three affidavits were filed, to-wit: that of Mr. Hirschfeld of counsel, Mr. Taub, an attorney in New York, and of Mr. Lenk, an officer of the German Bank. Mr. Hirschfeld's affidavit shows: that Fritz Mandl had left Germany and had fled to Austria, at the time he engaged said counsel; that shortly thereafter, Mandl was forced to leave Austria and had not been heard from for a long time; that he finally appeared in New York via South America; that Mandl's German lawyers were, because of their faith, unavailable; that the preparation of the case for trial was without

benefit of either said German counsel or Mandl; that shortly before trial Mandl was located in New York and through one Leo Taub, a New York attorney, said Mandl's deposition was arranged for; that fortuitously one Erick Lenk, the officer of the German Bank who had handled the transaction with Mandl arrived in New York, and hurriedly arrangements were made to take his deposition; that by reason of the lack of information needed counsel instructed said Taub to question said witnesses on the general subject matter of the litigation; that only a few days before trial their depositions arrived; that counsel had little or no time to examine them and so advised the court; the court stated the case had dragged too long, was one of the oldest cases on his calendar and counsel interpreted the court's remarks as an order to proceed; that counsel had at no time before trial been informed of the existence of an actual assignment of the claim by Mandl by said Bank; that upon learning the court's decision, particularly with reference to his basis for decision concerning an actual assignment, said counsel ascertained from Lenk that there had been an actual assignment made by the Bank in addition to the one recited in the notice to Universal; that counsel thereupon obtained an affidavit from Lenk with reference thereto. [R. pp. 61-68.]

Said Lenk's affidavit shows that after Mandl paid the debt which was secured by the claim against Universal, it was Lenk's opinion that Mandl succeeded to the claim against Universal automatically and so advised them by letter to prevent them from paying anyone other than Mandl; that this notice was given pending the giving of

an actual assignment to Mandl; that subsequently after obtaining permission of the German Foreign Exchange Control office to execute a formal assignment, he personally prepared such assignment to Mandl, was signed by said Lenk, countersigned by another officer of the Bank, notarized, documentary stamps affixed and mailed to Mandl, and a copy was retained by the Bank. Said assignment in substance recited the prior assignment from May, described it, recited the loan by the Bank, the payment thereof by Mandl, recited the date and number of the Devisionstelle permit and concluded: ". . . We herewith transfer and assign this claim against Universal Pictures Corp., New York, to you." Said Lenk stated he remembered the substance of the assignment as it was a general form used by the Bank for many years. He stated he did not volunteer anything about this assignment at the deposition as he was not asked about it. That he did not discuss the matter with Taub before giving the deposition and that Taub was unacquainted with those facts; that he was willing to testify to said facts in person. [R. pp. 72-77.]

Taub's affidavit discloses that after taking Mandl's deposition he went to Central America; that on his return he found letters from appellants' counsel urging the immediate taking of Lenk's deposition as the case was coming up for trial; he hurriedly took same, and delayed in sending both depositions to Los Angeles as he needed the exhibits of the former one in the latter. [R. pp. 69-70.]

It can thus be seen from said affidavits that counsel for appellants were under great difficulties in preparation of the pleadings and in preparation for trial. That further, the issue of actual or equitable assignment were first introduced during the trial. That only after the conclusion

of trial did counsel learn of the date and wording of an actual written assignment from the Bank to Mandl. That regardless of the court's opinion on the question of assignment by operation of law the affidavits disclosed said actual written assignment and in the interests of justice the court should have, on that ground alone, reopened the case for further evidence on that point or should have granted a motion for a new trial. In this way a determination of the issue of actual assignment could have been made

In determining the motion to grant a new trial, the court should be more liberal where such new trial will clear up an issue involving a plaintiff's right to sue than in cases where the additional evidence simply attempts to bolster up the merits of the cause of action itself.

We submit that a new trial should have been granted by the trial court.

Conclusion.

Appellants submit that the judgment herein, as it now exists, creates an unprecedented and impossible situation which only this Court can rectify. By a final Decree of a German court it has been finally determined that Mayfilm Corp. was not the owner of the judgment sued upon; but that the same was owned by Joe May, and that his assignment thereof to the Bank was valid. Such is the status of the judgment in Germany. The trial court, on the other hand, has determined that notwithstanding, Mayfilm Corp. is still the owner of the said judgment, that Joe May was not the owner, and that his assignment thereof to the Bank was ineffectual. Universal, nevertheless, admittedly owes the judgment to someone, but who this "someone" is, under the several conflicting judgments, cannot now be determined. Universal, now, can escape total liability, by using either of said judgments, as the

occasion may require. If it is sued by Joe May or his successor, it can use the judgment herein to claim that Mayfilm is the owner of the original judgment, while if action is brought by Mayfilm or its successor, it can set up the Declaratory Decree to support its claim that Mayfilm does not own the original judgment. Such a situation cannot continue to exist. We respectfully submit that the rights of the parties require, and that this Honorable Court should make a full determination of the evidentiary force and effect of the Declaratory Decree.

We further respectfully assert that the interests of the parties herein further require that there also be a full determination of the question of whether there was an assignment from the Bank to Mandl, either by operation of law, or by an equitable assignment, or by an actual assignment, for necessity requires that there be a determination as to where the ownership of the original judgment, admittedly owed by Universal, now exists. This question, too, we respectfully request, be fully determined by this Honorable Court.

In conclusion we respectfully submit that the record in this case is replete with prejudicial reversible error. It has been impossible to present all of them at length in this brief. We have, however, endeavored to point out those which in our opinion constitute the most serious. We sincerely believe we have done so. We therefore respectfully urge that the judgment be reversed, and that appellants be awarded all their costs on appeal.

Respectfully submitted,

Ellis I. Hirschfeld,

Samuel W. Blum,

Attorneys for Appellants.

Chapman v. Moore, 151 Cal. 509 at 514-16 (91 P. 324):

"Now, as to the effect of the decree. While respondent has contended here, though ineffectually, that the decree is void, he also insists that, even if valid, the trial court properly rejected it when offered as constituting a muniment of title in behalf of plaintiff against the defendant; that the decree was only conclusive against Patterson and parties in privity with him having notice of the judgment (Code Civ. Proc., sec. 1908, subd. 2), and did not affect the rights of the defendant Moore. And it is asserted by respondent in his brief that this was the view taken by the trial court. If so, it was incorrect.

"While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title.

"In Barr v. Gratz's Executors, 4 Wheat. 213, the rule is stated: 'It is true that, in general, judgments or decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the

decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title and constituting a part of the muniments of his estate. . . . To reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery, was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*' To the same effect are the cases of Kurtz v. St. Paul and D. R. Co., 65 Minn. 60 (67 N. W. 808); Gage v. Goudy, 141 Ill. 215 (30 N. E. 320); Railroad Equip. Co. v. Blair, 145 N. Y. 607 (39 N. E. 962); Bussey v Dodge, 94 Ga. 584 (21 S. E. 151); Skelly v. Jones, 70 N. Y. Supp. 447 (61 App. Div. 173). See, also, 24 Am. & Eng. Ency. of Law, p. 757; Freeman on Judgments, sec. 416.

"These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title, and we content ourselves simply with a reference to them, as nothing to the contrary is cited by respondent.

"Applying this rule, then, to the effect of this judgment considered with the other proofs of title made by appellant, it is justified by the evidence. It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson, and the presumption is that the legal title continued in him until it was shown that he had conveyed it, or that in some way it had become extinguished or his title defeated or barred. It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two it was there adjudged that the legal title, conceded, and theretofore presumed to continue, in Patterson, was,

as against him, in Davis, and such adjudication was as effective evidence of title to the property in the latter, and as conclusive of any claim of Patterson or his privies, as if Patterson had made him a conveyance of it by deed. A deed from Patterson to Davis would have been conclusive evidence against Patterson that legal title had in fact been transferred to Davis by him, and of course would be admissible as a link in the asserted claim of plaintiff of title to the property. So with the judgment. As it was as effective against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson and the presumption arising therefrom, together with the conveyance from Davis to plaintiff, established in him *prima facie* title to the property, which in the absence of any evidence of title in the defendant would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this *prima facie* showing that plaintiff was not the owner was not justified by the evidence."

Title Insurance Co. v. United States F. & G. Co., 121 Cal. App. 73, at 76-77 (8 P. (2d) 912):

"If, through either chain, Maybrook had become the owner at the time the policy of title insurance was issued, the judgment in this case must be affirmed. We shall therefore confine our further consideration to the second chain of title above outlined.

"When Daisy Grisham conveyed to Ramos Bros., Incorporated, it became the record owner of the property. If the judgment in the quiet title action brought by Maybrook against Ramos Bros., Incorporated, had the effect

of vesting the title of Ramos Bros., Incorporated, in Maybrook, this appeal must fail . . .

"Appellants' second point, that not being parties or privies they are not bound by Maybrook's judgment against Ramos Bros., Incorporated, is set at rest in this state by Chapman v. Moore, 151 Cal. 509 (121 Am. St. Rep. 130, 91 Pac. 324), and Kipp v. Reed, 183 Cal. 49 (190 Pac. 363). *The judgment obtained by Maybrook is as conclusive evidence against Ramos Bros., Incorporated, that title was in Maybrook, as if Ramos Bros., Incorporated, had given Maybrook a deed. Like a deed, it was admissible against appellants as a muniment of title to show that Maybrook through the judgment had acquired the title theretofore held by Ramos Bros., Incorporated.*

"Judgment affirmed." (Italics ours.)

Perkins v. Benguet etc. Co., 55 Cal. App. (2d) 720, 132 Pac. (2d) 70:

"The answer of defendant sets forth several defenses, most of them predicated on the contention that the dividends were payable to Mr. Perkins. It is important to note that defendant has never claimed, and does not now claim, any title to the stock, nor does it seek to show that anyone other than Mr. Perkins is entitled to the stock or dividends.

"At the trial of the present action *plaintiff offered no evidence of her title to the dividends except the judgment roll of the New York action.* Defendant's objections to the introduction of this record were overruled and *the New York record was admitted as competent and conclusive evidence of plaintiff's title.* Defendant made an offer to prove at the trial the allegations of its answer that the shares and the dividends belonged to the conjugal partner-

ship of plaintiff and her husband, and that, therefore, the dividends were payable to plaintiff's husband and his transferees. Defendant also offered to prove that, under the facts, Philippine law was applicable. The trial court sustained plaintiff's objections to such offers and *ruled that the New York judgment and every finding upon which it rests was conclusive against defendant with respect to everything therein adjudicated, i. e., res judicata in the same way as if defendant had been a party to the New York action.*" (Italics ours.) (P. 730.)

"On this appeal the basic contention of defendant is that the judgment of the New York court is not binding on it because, so it is urged, it was not a party or privy to a party to that action." . . . (P. 731.)

"It will thus be seen that in New York Mr. Perkins, in a forum of his own choosing, litigated the exact questions that defendant corporation seeks to litigate here. Every issue of fact and law that defendant corporation sought to raise in the trial court, except those later discussed, was litigated and passed upon by the New York Court of Appeals. The basic question now presented is whether defendant corporation should now be permitted to litigate those identical issues in California, or whether it is conclusively bound by the New York judgment under the doctrine of *res judicata. It should again be emphasized that defendant does not claim title in itself nor does it set up title in any third person. It claims the right to prove that the New York judgment was wrong and that in law and fact Mr. Perkins is entitled to the dividends on the stock—the very issue decided adversely to Mr. Perkins by the New York judgment.*" (Italics ours.) (P. 737.)

"It seems quite clear to us that as to the impounded dividends the corporation has no interest in this litigation separate from the interest of Mr. and Mrs. Perkins. It

claims no interest in the impounded dividends and sets up no interest of a third person. It simply claims that the dividends rightfully belong to Mr. Perkins, although, as between Mr. and Mrs. Perkins, it has finally been adjudicated that they belong to Mrs. Perkins. There are only two sides to this dispute over title to this stock, those of Mr. and Mrs. Perkins. The corporation's only interest is that it not be compelled to pay such dividends twice. As to such dividends, it is a mere stake-holder, a specialized form of bailee. If the New York judgment is binding on Mr. Perkins, if in an action brought by Mr. Perkins against the defendant for such dividends it can plead the New York judgment . . . the company is fully protected and should not be permitted to relitigate an issue which only involves Mr. and Mrs. Perkins, and which has already been passed on in New York. Inasmuch as it is our view that all these points must be decided in favor of Mrs. Perkins, it is our conclusion that, as to the impounded dividends, the New York judgment is clearly *res judicata* and binds defendant corporation although it was not a party to that action. . .

"As already pointed out, in the New York action between Mr. and Mrs. Perkins it has been determined that Mrs. Perkins owns the stock and is entitled to the dividends thereon. . . .

"Once the competing stockholders have litigated the question of title to a final conclusion, payment by the corporation to the successful party in such an action must be a defense in an action against the corporation by the other party. (Bernhard v. Bank of America, 19 Cal. 2d 807 (122 P 2d 892) (p. 738). Any other rule would lead to absurdities. Should the corporation be permitted in the present action to relitigate the title to the stock as between Mr. and Mrs. Perkins, in so far as the action involves its liability for impounded dividends, and should it obtain a

decision that it is not liable to Mrs. Perkins because Mr. Perkins is the owner, it would follow that in a suit brought by Mr. Perkins for the impounded dividends the corporation would be required to pay them to him. Otherwise, it would escape liability altogether. Mr. Perkins' obligation, if he recovered the dividends, would be to turn them over to his wife, since as between the two of them it has been held in the New York case that she is entitled to them. *Certainly, the company's interest not to be held liable twice for the dividends does not mean that it should not be held liable to one of the parties.* . . . (Italics ours.)

"It may be that a corporation in the position of defendant herein does not fit into definitions commonly given as to who is 'privy' to a judgment, so as to be bound by it although not a party. Where a situation arises which so obviously calls for application of the doctrine of *res judicata* as does the present case, in so far as it concerns impounded dividends, definitions of 'privies' and 'privity' drawn from other situations do not constitute an obstacle to reaching a sound result In 1 Freeman on Judgments (5th ed.), page 893, section 409, is the following pertinent observation: 'The rule limiting the effect of a judgment to parties and their privies is not to be taken in an absolutely literal sense nor is it without important qualifications and exceptions.

" 'Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies.' 'The question of who is concluded by a judgment has been obscured by the use of the words, "privity" and "privies," which in their precise technical meaning (p. 739) in law are scarcely determinetive always of who is and who is not bound by a judgment.'

"Defendant itself cites situations well recognized in the law where the relationship between the party sued in the

first action and the party sued in the second is such that the judgment in the first action is *res judicata*, and where, as here, the party sued in the second has no independent interest from that of the party sued in the first action. Thus, a landlord who defends through his tenant is conclusively estopped by the judgment (Valentine v. Mahoney, 37 Cal. 389); agents and servants are usually estopped by judgments against the principal or master (Satterlee v. Bliss, 36 Cal. 489); and a bailee by judgment against the bailor (Hughes v. United Pipe Lines, 119 N. Y. 423 (23 N. E. 1042)). The same reasoning applies to a stakeholder who is holding a fund as a disinterested party awaiting a final determination as to who, as between two disputing claimants, is entitled to the fund. As to such fund the third party, the corporation here, is a specialized form of bailee. *Every principle of reason, fairness, justice and equity compels the conclusion that it should be bound by a final judgment between the two disputing claimants.*" . . (Italics ours.) (P. 740.)

"*If a corporation has no adverse interest in an action between two disputants over title to its stock, it cannot gain such an adverse interest by choosing sides in the controversy and paying the dividends to one of the disputants with full knowledge of the other's claims.* (Italics ours.)

"There is a remarkable paucity of authority on the subject under discussion. We have been referred to but two cases from other jurisdictions where the point here under discussion was directly involved. Both of them support the conclusions above set forth.

"Hughes v. United Pipe Lines Co., 119 N. Y. 423 (23 N. E. 1042), was decided by the New York Court of Appeals. The facts were that William and Maria Stephans drilled and produced oil on land claimed by Hughes. The oil was stored by the Stephanses with the United Pipe Lines Company. Hughes notified the company that the

oil was his. The Stephanses sued Hughes to quiet title to the oil and Hughes secured an adjudication that he was the owner of the oil. The United Pipe Lines Company was not a party to that action. United Pipe Lines Company, with full knowledge of the dispute, took indemnity from the Stephanses and delivered the oil to them. Hughes sued the United Pipe Lines Company for conversion. The Stephanses were not parties to this action. (P. 749.) The trial court held that the judgment between the Stephanses and Hughes was conclusive on the issue of title as against the United Pipe Lines Company. This conclusion was affirmed, the court stating (23 (N. Y.) N. E. at p. 1043): 'The very matter in issue in that action was the title to the well, and the oil produced therefrom. To maintain their action the plaintiffs were bound to establish that the well and oil belonged to them, and the defendant in that action could defeat the same by showing that the well and oil belonged to him, and he prevailed upon that issue; and thus there was an adjudication, binding upon the plaintiffs therein, that they had no title to the well, or the oil produced therefrom, and that the same belonged to Hughes. The fact thus established could not again be brought in dispute between the same parties or their privies; and the judgment in that action conclusively established against the plaintiffs therein the right and title of Hughes to the well, and the oil produced therefrom. This defendant stands in the place of Stephans and wife. *It does not hold or claim the oil in its own right, but claims solely to hold it for Stephans and wife, by whom it has been indemnified against the claim of this plaintiff. The adjudication, therefore, which binds them, binds it; and this conclusion rests upon law so elementary that no citation of authorities to sustain it is needed.* It is clear, therefore, that the plaintiff is entitled to recover the value of this oil from the defendant. He early gave it notice of his claim. He

demanded the oil of it, and it refused to recognize his right.' (Italics added.)

"Defendant practically concedes that the second case—Commercial Nat. Bank v. Allaway, 207 Iowa 419 (223 N. W. 167)—decided by the Supreme Court of Iowa in 1929, is in point, its basic argument being that the decision is wrong. In that case, Allaway delivered his demand note to the Iowa Savings Bank. That bank pledged that note, together with others, with the Commercial National Bank to secure a loan. The Iowa Savings Bank failed, whereupon the Commercial National Bank sold out the pledge and purchased Allaway's note. The Iowa Savings Bank sued Commercial National Bank to recover the note, charging fraud in the sale, and its lack of authority to make the pledge. Judgment went for Commercial National Bank." (P. 750.)

"After that judgment became final, the Commercial National Bank brought the present action against Allaway on the note. Allaway's defense was that the Iowa Savings Bank was the owner of the note, and that he had paid that bank the full amount of the note. The Commercial National Bank pleaded the former adjudication as *res judicata*. The trial court decided against that contention. Thus, the situation is one where Allaway owed a debt and two banks claimed it. In litigation between the banks, to which Allaway was not a party, it was decided that bank A owned the note. Bank A sued Allaway and he defended on the ground that he had paid bank B, and that B, in fact, owns the note. The Supreme Court of Iowa, in reversing the trial court, held the prior judgment between A and B *res judicata* against Allaway on the issue of ownership, and that he could not (223 N. W., p. 168) 'have adjudicated, for the second time, a controversy that was settled by a former trial. . . .' That is exactly the legal situation presented in the instant case. In disposing

of the contention that the judgment was not *res judicata,* the court stated:

" 'So far, then, as the Iowa Savings Bank and its receiver are concerned, the adjudication certainly is complete. Can the appellee assert the fact thus found, in any way, that the Iowa Savings Bank and the receiver could not? Manifestly not, so far as the issues here involved are affected. Each assertion thus made by appellee must have been for and on behalf of the Iowa Savings Bank and its receiver, because the appellee was attempting in the trial below to prove that the appellant was not the real party in interest, by showing that truly and legally the Iowa Savings Bank and its receiver were such parties. To do this, it was necessary for appellee to become, for the time being, so far as his cause is concerned, the Iowa Savings Bank or its receiver.

" 'Hence, for all practical and legal purposes, appellee became the Iowa Savings Bank or its receiver, in order to plead their cause in the premises. A higher right could not accrue to the appellee in this respect than that owned and possessed by the Iowa Savings Bank and its receiver. Should appellee succeed, it must be on the rights and properties of the Iowa Savings Bank and its receiver in and to the note in question. Appellee himself had no property in this note, which is in the hands of an innocent purchaser for value, because he is the maker thereof, and not the owner. (P. 751.) The only interest he claims therein is the right to make an offset against it, providing the same legally again became the property of the Iowa Savings Bank. Clearly then, the adjudication which bound the Iowa Savings Bank and its receiver must of necessity, in the instance here under consideration, bind appellee, because appellee in this proceeding is simply reasserting the same rights, equities, and properties as those which were advanced in the former suit.

" 'Necessarily, in the present controversy, appellee must, in asserting his own claims, step into the position of the Iowa Savings Bank and its receiver, and there proclaim for them their (the Iowa Savings Bank and its receiver) own ownership of the note; for, if appellant is not the real party in interest, it is because that bank and its receiver owned appellee's note.' The court then went on to hold that the prior judgment between the two banks, so far as the issue of ownership of the note was concerned, was a conclusive 'muniment of title' which Allaway could not deny.

"The factual situations presented in these two cases are practically identical with that presented in the instant case. In both, prior to the second trial, the defendant had parted with money or property so that if the first judgment was binding on him, his sole recourse was to collect from the unsuccessful litigant in the first case. In both, the defendant in the second trial was not asserting his or a third person's title, but was seeking to assert the title of the unsuccessful litigant in the first action. Those are the identical facts here presented." (P. 752.)